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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1939~~ 1940

No. ~~476~~ 3

THE UNITED STATES OF AMERICA, APPELLANT

vs.

NORTHERN PACIFIC RAILWAY COMPANY, NORTHERN PACIFIC RAILROAD COMPANY, NORTHWESTERN IMPROVEMENT COMPANY, ET AL.

No. ~~477~~ 4

NORTHERN PACIFIC RAILWAY COMPANY, NORTHERN PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS

vs.

THE UNITED STATES OF AMERICA

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON

FILED OCTOBER 20, 1939

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 476

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON

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1 IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

In Equity, No. E. 4389

UNITED STATES OF AMERICA, PLAINTIFF

v.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION; NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION; NORTHERN PACIFIC RAILROAD COMPANY, AS REORGANIZED IN 1875; NORTHWESTERN IMPROVEMENT COMPANY, A CORPORATION; BANKERS TRUST COMPANY, A CORPORATION; GUARANTY TRUST COMPANY, A CORPORATION; CITY BANK FARMERS TRUST COMPANY, A CORPORATION, DEFENDANTS

[File endorsement omitted.]

Bill of complaint

Filed July 31, 1930

The United States of America, by William D. Mitchell, Attorney General thereof, Seth W. Richardson, Assistant Attorney General, Roy C. Fox, United States Attorney for the Eastern District of Washington, D. F. McGowan, Special Assistant to the Attorney General, and E. E. Danly, Special Assistant to the Attorney General, files this bill against the defendants herein named and shows unto this Court:

I

That this suit is brought by and under the direction of the Attorney General of the United States, by and on behalf of the United States, under the provisions of the Act of June 25, 1929 (46 Stat. 41), and otherwise, for the purpose of enforcing the forfeiture declared in said Act, for the adjustment of the land grants made by Congress under the Act of July 2, 1864, as
2 modified and supplemented by the Joint Resolution of May 31, 1870, for the removal of certain indemnity lands from the operation of the said land grants, and for the quieting of title thereto, for an accounting, and for other purposes, as set out and contained in this bill of complaint; that the suit arises under the Constitution and laws of the United States, and that the amount involved therein is in excess of $100,000.

II

That the defendant, the Northern Pacific Railroad Company, is a federal corporation organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365), having an office and principal place of business in the City of New York, State of New York.

That the defendant, the Northern Pacific Railroad Company as reorganized in 1875, is the Northern Pacific Railroad Company, self-styled, which came into existence under a plan for the reorganization of the Northern Pacific Railroad Company, dated June 30, 1875, which was promulgated coincident with certain Receivership proceedings, as hereinafter alleged; that the principal place of business of this defendant is in the City of New York, State of New York; that in this bill this defendant, unless otherwise described, is referred to as the Northern Pacific Railroad Company, as reorganized, and as separate and distinct from the Northern Pacific Railroad Company.

That the defendant, the Northern Pacific Railway Company, is a corporation organized under the laws of the State of Wisconsin, and having its general offices at St. Paul, Minnesota. In this bill of complaint references to the predecessors in interest of this defendant are to the said Northern Pacific Railroad Company and/or the said Northern Pacific Railroad Company as reorganized.

That the defendant, the Northwestern Improvement Company, is a corporation organized and existing under the laws of the State of New Jersey, and having an office and principal place of business in New York City.

That the defendants, Bankers Trust Company, Guaranty Trust Company and City Bank Farmers Trust Company, are corporations each organized and existing under the laws of the
3 State of New York, each having its principal place of business in New York City, and each claiming interests adverse to your plaintiff in the subject matter of this suit.

III

That under and by virtue of the Act of July 2, 1864 (13 Stat. 365), Congress created a body corporate with a federal franchise by the name, style, and title of the Northern Pacific Railroad Company, for the purpose of laying out, locating, constructing, furnishing, and enjoying a continuous railroad and telegraph line with appurtenances, namely, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by

said company, within the territory of the United States on a line north of the forty-fifth degree of latitude to some point on Puget Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than 300 miles from its western terminus; that the said Act of July 2, 1864, provided that the capital stock of the said Northern Pacific Railroad Company shall consist of 1,000,000 shares of $100 each, and the said Act provided further that all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in the act of incorporation is taken up, by complying with the terms of subscription. The said Act provided further that so soon as 20,000 shares of the stock of said corporation shall in good faith be subscribed for and $10 per share actually paid into the treasury of the company, the subscribers to such stock shall elect directors for said corporation.

That the said Act, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, made a grant of certain of the public lands of the United States to the said Northern Pacific Railroad Company, as follows:

"SEC. 3. And be it further enacted, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the

Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, That the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, and within fifty miles thereof (41 L. D. 571), may be selected as above provided: And provided further, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: * * *"

That the said Act of July 2, 1864, provided further, among other things, for a right of way, for the railroad to be constructed by the Northern Pacific Railroad Company, and said Act provided further that the grants, rights, and privileges given to and accepted by the Northern Pacific Railroad Company shall be upon and subject to the conditions that the said Northern Pacific Railroad Company shall commence the work on said road within two years from the approval of the Act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July 1876; that the said Act provided further that no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way except by the consent of the Congress of the United States, and that said Act provided further:

"SEC. 20. And be it further enacted, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due re-

gard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act."

That by Resolution of May 7, 1866 (14 Stat. 355) the said Act of July 2, 1864, was modified to extend the time for commencing and completing the Northern Pacific railroad and its several sections by a term of two years; that by Resolution of July 1, 1868 (15 Stat. 255), the said Act of July 2, 1864, was further modified to provide:

"That each and every grant, right, and privilege herein, are so made and given to and accepted by said Northern Pacific Railroad Company upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from and after the second day of July, eighteen hundred and sixty-eight, and shall complete not less than one hundred miles per year after the second year thereafter, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, Anno Domini eighteen hundred and seventy-seven."

That by the Resolution of March 1, 1869 (15 Stat. 346), the said Act of July 2, 1864, was further modified to enable the said Northern Pacific Railroad Company to issue its bonds, and to secure the same by mortgage upon its railroad and its telegraph line for the purpose of raising funds with which to construct said railroad and telegraph line between Lake Superior and Puget Sound, and also upon its branch to a point at or near Portland, Oregon.

That by the Resolution of April 10, 1869 (16 Stat. 57), the said Act of July 2, 1864, was further modified to authorize
6 the said Northern Pacific Railroad Company to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains in the Territory of Washington, with the proviso that the company should not be entitled to any subsidy in money, bonds, or additional lands of the United States in respect to said extension of its branch line, except such lines as might be included in the right of way.

That by the Joint Resolution approved May 31, 1870 (16 Stat. 378), Congress further modified and supplemented the said Act of July 2, 1864, to authorize the said Northern Pacific Railroad Company to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal and mixed, as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini, eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points; Provided, that all lands hereby granted to said company which shall not be sold or disposed of, or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage

may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: Provided further, That in the construction of the said railroad, American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

"SEC. 2. And be it further resolved, That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company, and any other parties."

IV

That by the said Act of July 2, 1864, Congress provided for and granted to the said Northern Pacific Railroad Company, but to no other person or persons, a federal franchise to be and to exist as a corporation; that neither in the said Act of July 2, 1864 as enacted nor as modified and supplemented, did Congress provide an authorization or provision under which the said federal franchise to be a corporation could be purchased, acquired, or used by any person or persons, other than the said Northern Pacific Railroad Company.

V

That the said Act of July 2, 1864 as enacted and as modified and supplemented successively by the said Resolutions of May 7, 1866 (14 Stat. 355), July 1, 1868 (15 Stat. 255), March 1, 1869 (15 Stat. 346), April 10, 1869 (16 Stat. 57), and May 31, 1870 (16 Stat. 378), and the various and respective provisions thereof, was accepted by the said Northern Pacific Railroad Company, and constituted a contract between the said Northern Pacific
8 Railroad Company and the United States of America, with the obligations therein set forth to be performed in full as laws as well as contracts respectively by the said Northern Pacific Railroad Company and by your plaintiff, the United States of America; that when references are hereinafter made to the contract between the United States and the Northern Pacific Railroad Company, or the contract created by the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, the references are to the contract created by the said Act of July 2, 1864 as the same had been modified and was outstanding upon the happening of the particular things complained of.

VI

That said Act of July 2, 1864 required that bona fide subscriptions for the stock of said Northern Pacific Railroad Company to the amount of $2,000,000 with 10% paid thereon should be made within two years after the passage and approval of said Act, otherwise said Act would be null and void, and further provided for the election of a Board of Directors after 20,000 shares of said stock had been subscribed for and $10 per share paid thereon; that during the latter half of the year 1864, Josiah Perham and a few of the persons whose names appear in the Act of July 2, 1864, pretended to subscribe for 20,075 shares of said stock and pretended to pay thereon into the treasury of said company $10 per share; that in December, 1864, the subscribers to said stock elected directors who in turn elected the following officers of the Northern Pacific Railroad Company, namely, Josiah Perham, President; Philander Reed, Vice President; Charles S. Perham, Secretary; and Increase S. Withington, Treasurer; that on January 5, 1865 J. Gregory Smith became President of said company; that on January 16, 1866 an assessment of 90% on all of said stock was made, and on February 2, 1870, said assessment being unpaid, said stock was by the then Board of Directors of said company declared forfeited; that although said Act of July 2, 1864 contemplated and required bona fide subscriptions and actual payment of 10% thereon before an election of the
9 Board of Directors of said company could be had, no bona fide subscriptions were made for $2,000,000 of the capital stock of the said Northern Pacific Railroad Company with 10% paid thereon within two years after the passage and approval of said Act, nor was there ever a payment of $10 per share on the said 20,075 shares or any part thereof paid into the treasury of said company for the use and benefit of said company or otherwise, but said subscribers only pretended to have paid $10 per share on the stock subscribed for; that this pretended payment was a sham and a fraud against the said Northern Pacific Railroad Company and against the United States and constituted a breach of the contract between said company and the United States.

VII

That in the year 1865, the said Northern Pacific Railroad Company issued as fully paid 6,000 shares of its capital stock of the par value of $100 per share to the said Josiah Perham and certain of his associates without there having been paid therefor into the treasury of said Northern Pacific Railroad Company the

sum of $100 for each share of stock so issued, in violation of the provisions of the said Act of July 2, 1864; that thereafter this said stock was reacquired, through purchase or otherwise, by the said Northern Pacific Railroad Company.

VIII

That on January 10, 1867, the said J. Gregory Smith, then President, and his associates, William B. Ogden, B. P. Cheney, A. H. Barney, William G. Fargo, G. W. Cass, and J. Edgar Thompson, directors of said railroad company, claiming to have expended $102,000, exclusive of their compensation, for the charter and franchise of said company, claiming to have control thereof and desiring to perfect an organization to request further aid from Congress, entered into a personal agreement in writing, a copy of which is attached to this bill and marked Exhibit A, wherein they agreed to recognize as valid, stock of the said company to the amount of $600,000 issued by Josiah Perham, late president thereof, and to divide the railroad enterprise into twelve shares or parts, valued at $8,500 each, to be divided among themselves exclusively, and entitling the holders thereof to interests in said enterprise and representation on the Board of Directors of the said Northern Pacific Railroad Company in proportion to the number of shares or parts of shares held by each; that on July 31, 1867, said agreement was supplemented by a personal agreement in writing signed by the said Smith while President and the said Ogden, Cheney, Barney, Fargo, Cass and Thompson, while directors of the said Northern Pacific Railroad Company, and others, a copy of which is attached to this bill as Exhibit B, increasing the contribution of each shareholder to not over $12,500 per share; that the said agreement of January 10, 1867, as entered into and as modified by the aforesaid supplemental agreement of July 31, 1867, was fraudulent and illegal and was made in violation of the provisions of the said Act of July 2, 1864, in that the said Northern Pacific Railroad Company permitted, allowed, and sanctioned the parties thereto to dominate and control the franchise and capital stock of said Northern Pacific Railroad Company and to assert and receive from the said Northern Pacific Railroad Company an interest in the capital stock of said company, and all of it, without said stock having been purchased as required by the Act of July 2, 1864, or at all.

That during the year 1869 the said Smith and his associates in pursuance of said agreement and in continuation of their illegal and unlawful control of the charter and affairs of said

Northern Pacific Railroad Company and their pretended right to receive the capital stock thereof, and all of it, without having purchased it as required by the Act of July 2, 1864, or at all, caused a provisional agreement to be entered into by the said Northern Pacific Railroad Company and Jay Cooke & Company of Philadelphia, making the said Jay Cooke & Company fiscal agents for said Northern Pacific Railroad Company, a copy of which agreement is attached hereto marked Exhibit C; that the said agreement and a supplemental agreement of January 1, 1870, hereinafter referred to, were signed on behalf of the said

11 Northern Pacific Railroad Company by J. Gregory Smith, President, and by R. D. Rice, A. H. Barney, W. B. Ogden, G. W. Cass, J. Edgar Thompson and William G. Fargo, as members of the Executive Committee of the said Northern Pacific Railroad Company, while each and all of said persons were holders of so-called shares in the said Northern Pacific Railroad Company under the aforesaid agreement of January 10, 1867, as supplemented by the aforesaid agreement of July 31, 1867; that at the time of the signing of said provisional agreement of May, 1869 and the agreement of January 1, 1870, hereinafter referred to, between the said Northern Pacific Railroad Company and the said Jay Cooke & Company, the said Smith and his associates pretended to be entitled to receive from said railroad company the entire $100,000,000 of the capital stock of said railroad company when the said Smith and his associates were not entitled to receive any part of said capital stock because the same had not been purchased by them as required by or after the manner prescribed in the Act of July 2, 1864, or at all; that under said provisional agreement the twelve shares above described were increased to eighteen, six of which were to be assigned to the said Jay Cooke & Company, and said provisional agreement further provided that of the said $100,000,000 capital stock of said company, $80,001,000 thereof should be subscribed for by the holders of said eighteen shares in equal portions and issued in full paid stock to the holders thereof as follows: $124,500 par value immediately and $54,000 par value to the holders of each of said eighteen shares whenever and as often as twenty-five miles of said railroad were constructed so as to be run over by cars; that the remaining $19,999,000 was to be delivered to the said Jay Cooke & Company in full paid stock as follows: As the proceeds of the sale, by the said Jay Cooke & Company, of each $1,000 of the bonds of said railroad company were placed to the credit of said railroad company, $200 par value of said stock should be placed to the credit of the said Jay Cooke &

Company; that said agreement of May 20, 1869 was made provisional pending an investigation of the railroad enterprise
12 by the said Jay Cooke & Company; that said investigation was made and the said Jay Cooke & Company being satisfied as to the merit and feasibility of the undertaking agreed to enter upon the performance of said provisional agreement subject to certain modifications contained in a supplemental agreement, dated January 1, 1870, between the said Northern Pacific Railroad Company and the said Jay Cooke & Company, wherein it was agreed that the eighteen shares were to be increased to twenty-four, twelve of which were to be assigned to said Jay Cooke & Company; that it was further agreed therein that of the $100,000,000 par value of capital stock, $80,001,000 thereof should be subscribed for by the holders of said twenty-four shares and should be issued in fully paid up stock as follows: $93,400 par value to be issued to said holders immediately and $40,500 par value to each of the holders of said twenty-four shares as twenty-five miles of said road were completed; that the remaining $19,999,000 was to be delivered to the said Jay Cooke & Company in full paid stock as follows: as the proceeds of the sale, by the said Jay Cooke & Company, of each $1,000 of the bonds of said railroad company were placed to the credit of said railroad company, $200 par value of said stock should be placed to the credit of the said Jay Cooke & Company; that a copy of said agreement of January 1, 1870, is attached hereto as Exhibit D; that under and by virtue of the aforesaid agreement of May 20, 1869, as supplemented by the agreement of January 1, 1870, there were issued by said Northern Pacific Railroad Company prior to January 1, 1875 to the said Smith and his said associates and to certain other persons and to the said Jay Cooke & Company, or the transferees thereof, a total of 299,526 shares, more or less, of the par value of $29,952,600, more or less, of the capital stock of said railroad company as full paid stock, when in truth and in fact the said stock was not fully paid up or at all paid up, but was issued without any consideration having been received therefor by said Northern Pacific Railroad Company and without said railroad company having received $100 for each
and every share thereof as required by the Act of July 2,
13 1864; that the issuance of said stock was in violation of the provisions of Section 10 of the said Act of July 2, 1864, which provided:

"That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is

taken up, by complying with the terms of subscription; * * *" in that the entire capital stock of said railroad company was withdrawn from public subscription and pledged for distribution according to the terms of said agreement of May 20, 1869, as supplemented by agreement of January 1, 1870.

That the said Northern Pacific Railroad Company in disposing of the said stock in the manner aforesaid illegally dissipated one of the means provided by Congress for the raising of funds by the said Northern Pacific Railroad Company with which to construct the railroad and telegraph line contemplated by the said Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, to aid in which construction Congress made a grant of lands; that as a consequence of such dissipation of the said capital stock of the said Northern Pacific Railroad Company, the said company deprived itself of the moneys it would have received had the said capital stock been sold in the manner and at the price provided in the said Act of July 2, 1864; that as a consequence of such dissipation of such capital stock by the said Northern Pacific Railroad Company in the manner aforesaid, the said company incapacitated itself for constructing any of its said railroad and telegraph line under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, with moneys which would have been received by it had the said capital stock been sold, as Congress intended and provided for in the said Act of July 2, 1864; that as a partial or total consequence of such dissipation either in part or in whole of said capital stock, the said Northern Pacific Railroad Company failed to construct forty miles each year of its main line between Portland, Oregon, and its western terminus, after constructing the first twenty-five miles
14 thereof, as provided by the Joint Resolution of May 31, 1870, modifying and supplementing the said Act of July 2, 1864, and as a partial or total consequence of such dissipation of the said capital stock, the said Northern Pacific Railroad Company failed to construct one hundred miles of the railroad, or any part thereof, as required to be constructed by the said Act of July 2, 1864, as modified, during the years July 1, 1873–1874; July 1, 1874–1875; July 1, 1875–1876; July 1, 1876–1877; July 1, 1877–1878, and failed to construct, equip, furnish, and complete the entire road by July 4, 1879, or at all, as required by the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870.

IX

That at the instance of the said Jay Cooke & Company and other representatives of the said Northern Pacific Railroad Company, legislation was introduced in Congress which, after amendment, became the Joint Resolution of May 31, 1870; that under the authority of said Resolution the said railroad company as party of the first part issued a mortgage or deed of trust dated July 1, 1870, purporting to convey to Jay Cooke and John Edgar Thompson of Philadelphia, Pennsylvania, as parties of the other part, all of the property of the Northern Pacific Railroad Company including the lands granted by Congress to aid in the construction of said railroad and telegraph line then estimated by said mortgagor at 60,000,000 a es, as security for the payment of bonds to be issued by said railroad company to the extent of $50,000 for each mile of the said main line and branch line of the then estimated 2,500 miles of railroad to be constructed by the said railroad company under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that a copy of said mortgage was filed with the Secretary of the Interior under the provisions of the Joint Resolution of May 31, 1870; that a copy of said mortgage is hereto attached as Exhibit E.

That bonds amounting to $31,000,000, more or less, secured by said mortgage were sold to the public on behalf of said
15 railroad company by the said Jay Cooke & Company; that with moneys received from the sale of said bonds and with moneys otherwise received, no part of which was from the sale of the capital stock of said company, the said company constructed its railroad under the Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, from Thompson Junction, Minnesota, approximately 425 miles to Bismarck, North Dakota, and from Kalama, Washington, to Tacoma, Washington, a distance of approximately 106 miles; that the said railroad between Thompson Junction and Bismarck was completed prior to December 31, 1872, and the railroad between Kalama and Tacoma was completed prior to December 31, 1873; that no railroad was constructed by the said company under the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, between December 31, 1873, and July 4, 1879.

That at a general meeting of the bondholders of the said Northern Pacific Railroad Company held on March 18, 1875, a committee was appointed to consider ways and means for the

reorganization of the said Northern Pacific Railroad Company, and thereafter prepared a plan, which plan as amended was adopted by the said bondholders' committee on June 30, 1875, and became the plan for the reorganization of said Northern Pacific Railroad Company; that a copy of said plan is attached hereto as Exhibit F; that said plan of reorganization of June 30, 1875, was collusive and was fraudulent against the United States, in that it was the intent and purpose of said plan as contemplated and as effectuated, and of the subscribers thereto and the beneficiaries thereunder, and as more fully hereinafter set out, to procure and obtain for the use and benefit of the said Northern Pacific Railroad Company, as reorganized or pretended to be reorganized under said plan, certain of the lands granted by Congress under the said Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, which lands were then owned by the said Northern Pacific Railroad Company, when the said lands and all of them should have been sold at public sale in the States and Territories where situate, in single
16 sections or subdivisions thereof to the highest and best bidder, upon the foreclosure of the said mortgage of July 1, 1870, as required by the said Joint Resolution of May 31, 1870.

That on April 16, 1875, Jay Cooke and John Edgar Thompson trustees under said mortgage of July 1, 1870, filed a bill of complaint in a friendly suit in the Circuit Court of the United States for the Second Judicial Circuit and Southern District of New York, alleging among other things that default had occurred in the payment of interest on bonds secured by said mortgage, and praying for the disposition of the property covered by said mortgage and the appointment of a Receiver; that the facts alleged in said bill of complaint were admitted by the railroad company in its answer thereto; that the said Jay Cooke and J. Edgar Thompson were the holders of stocks and bonds of the said Northern Pacific Railroad Company; that one George W. Cass, then and for some time prior thereto and thereafter a director and owner of stocks and bonds in said company, was appointed Receiver; that all of said proceedings were had with full approval of said bondholders' committee; that it was the intent and purpose of all parties in any way connected with the said plan of reorganization to collusively and fraudulently acquire for the bondholders under the said mortgage of July 1, 1870, and the stockholders of the said Northern Pacific Railroad Company, as the said bondholders and stockholders of the said Northern Pacific Railroad Company, all of the property of the said Northern Pacific Railroad Company as it existed at the time of the said plan of reorganization of June 30, 1875, for the benefit of the said

stockholders and bondholders and by removing from the said Northern Pacific Railroad Company, the federal Corporation as it existed at the time of said plan of reorganization of June 30, 1875, all of its property of every kind whatsoever, including its federal franchise, to be a corporation, and that said plan which was adopted to effectuate such a purpose was carried out and consummated by consent of the parties thereto with the aid and assistance of the decrees and orders of the court made and entered in the aforesaid
17 suit, all of which said decrees and orders were entered with the consent of the parties thereto, except that the federal franchise to be a corporation of the said Northern Pacific Railroad Company did not pass to the Northern Pacific Railroad Company as reorganized under said plan, or otherwise; that under said plan an organization styled the Northern Pacific Railroad Company claiming to own and to be entitled to operate under the federal charter to be a corporation granted by Congress to the Northern Pacific Railroad Company as aforesaid was set up by the purchasers of the properties of said federal corporation, with a capitalization of $100,000,000 divided into $51,000,000 of preferred stock and $49,000,000 of common stock; that of said $51,000,000 of preferred stock so created, $44,000,000 thereof, more or less, was used for the redemption and exchange of the bonds to the amount of $31,000,000, more or less, that had been issued by the Northern Pacific Railroad Company, the federal corporation, and secured by said mortgage of July 1, 1870; that of the $49,000,000 of common stock so provided for, $29,952,600 thereof, more or less, was used to acquire and retire the same amount of common stock that had been issued by said Northern Pacific Railroad Company, a federal corporation, prior to said reorganization and as aforesaid, and the residue of said $49,000,000 of common stock, to wit, $19,047,400, more or less, was set aside to be and was issued ratably or otherwise as the building of twenty-five mile sections of said road progressed, in recognition of the pretended rights of claimants under the provisions of the above-mentioned agreement of May 20, 1869, as modified by said agreement of January 1, 1870, aforesaid; that the said reorganization plan of June 30, 1875 provided further that the said preferred stock of said Northern Pacific Railroad Company should be convertible at par into any lands belonging to said railroad company, or thereafter belonging to it, east of the Missouri River in the State of Minnesota and in the Territory of Dakota, until default shall occur in some of the provisions of the new first mortgage bonds contemplated by said plan of reorganization, and
18 that the conversion of said preferred stock should be an extinguishment thereof.

That not any of the aforesaid $51,000,000 of preferred stock or of the $49,000,000 of common stock of the said Northern Pacific Railroad Company as reorganized was issued upon an open and public subscription open to all the people of the United States, as required by the said Act of July 2, 1864, nor did the said Northern Pacific Railroad Company as reorganized receive $100 in cash for each and every share of stock so issued, as required by the said Act of July 2, 1864.

That the plaintiff was not in any way a party to said plan of reorganization, nor to the foreclosure proceedings above described under which the assets of the Northern Pacific Railroad Company were sold or attempted to be sold under decrees of the court as herein set forth; that all of the proceedings in said suit were amicable between the parties, and the decrees of the court were consent decrees; that said plan of reorganization and said court proceedings constituted in effect one entire, harmonious and prearranged plan under which the property and assets of the Northern Pacific Railroad Company, the federal corporation, were to pass into the hands of the bondholders' committee for the benefit of the bondholders and stockholders of said company; that at the time said foreclosure proceedings were commenced, as aforesaid, said railroad company had obtained upwards of 8,000,000 acres of public lands of the United States opposite railroad constructed as aforesaid under said Act of July 2, 1864, as modified and supplemented by said Joint Resolution of May 31, 1870, large acreages of which had been sold.

That notwithstanding such sales, there were on April 16, 1875, the date on which the said foreclosure proceedings were filed, large areas of the said 8,000,000 acres of lands that were situate in the State of Minnesota and Oregon and in the Territories of Washington and Dakota, that were then owned by the said railroad company that were under and subject to the provisions of the said Joint Resolution of May 31, 1870, the exact quantities and descriptions of said lands being known only by the
19 defendants in this action; that all of said lands which on April 16, 1875 were owned by said railroad company were covered by and subject to the terms of said mortgage or deed of trust, dated July 1, 1870, which mortgage was subject to the provisions and requirements of the said Joint Resolution of May 31, 1870, which provided and required that in the event of the foreclosure of the mortgage authorized thereby or the sale by the trustees to whom the mortgage was executed of any of the granted lands covered by the said mortgage, either at its maturity or for any failure or default under the terms thereof, the said lands should be sold at public sale at places within the

States and Territories in which the said lands shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof; that notwithstanding said requirements of the said Joint Resolution of May 31, 1870, and notwithstanding said proceedings were had for the foreclosure of the mortgage authorized thereby, to wit, the said mortgage of July 1, 1870, not any of the said lands owned by the said Northern Pacific Railroad Company on April 16, 1875, or otherwise, were so sold, but to the contrary, 838,852 acres, more or less, of the said lands were sold under collusive and colorable private sales, in tracts exceeding 640 acres, without bona fide consideration, in New York City, New York, or elsewhere, by the said George W. Cass, Receiver, and the said Jay Cooke and Charlemagne Tower, trustees under the said mortgage of July 1, 1870, to Frederick Billings, as the representative of the committee of bondholders appointed under the said plan of reorganization of June 30, 1875, and conveyances of the said lands to the said Billings under the said sales were made by the said Receiver and the said trustees under deeds dated December 16, 1876; that the balance of the said lands owned by the Northern Pacific Railroad Company on April 16, 1875, and aggregating hundreds of thousands of acres, were sold in one transaction, with certain other properties of the said Northern Pacific Railroad Company, for a pretended consideration of $100,000, at a collusive and fictitious public sale held in New York City, New York, on August 12, 1875, in which City or State not any of the said lands were situate, and thereafter conveyances covering the said lands under the said sales were made by Oliver Fiske and Kenneth G. White, Master Commissioners, by deed dated September 17, 1875, and by the said Receiver, George W. Cass, and the said trustees, Jay Cooke and Charlemagne Tower, under deeds dated September 27, 1875, to Frederick Billings, et al., the bondholders' committee appointed under the said plan of reorganization of June 30, 1875; that not any of the said lands were sold to third persons upon the foreclosure of said mortgage as required by the said Joint Resolution of May 31, 1870; that the said lands, with the exception of a limited portion thereof, were all sold to or for the benefit of the bondholders and stockholders of the said Northern Pacific Railroad Company, so called, as reorganized under the said plan of reorganization of June 30, 1875, and the said lands upon being so sold were taken over through various conveyances by the said Northern Pacific Railroad Company as reorganized in 1875, and thereafter dealt with, and/or sold, (except as otherwise indicated by this bill) by the said Northern Pacific Railroad Company as reorganized, at such times, to such

persons, at such places, in such quantities, and at such considerations as suited its pleasure, and the said company received therefor values in excess of the prices the said lands would have brought had they been sold under bona fide sales to third persons upon the foreclosure of the said mortgage of July 1, 1870, all in violation of the aforesaid requirements of the said Joint Resolution of May 31, 1870; that not any of the said lands were sold or were intended to be sold under bona fide sales as contemplated by the said Joint Resolution of May 31, 1870, in the event of a foreclosure of the mortgage authorized thereby, but the said lands and all of them did pass to and for the use and benefit of the said Northern Pacific Railroad Company, as reorganized under the said plan of June 30, 1875, and for the use and benefit of the stockholders and bondholders who participated in said plan, and who were the originators of, and the proponents
21 of the said plan; that the said sales of the said lands to the said Northern Pacific Railroad Company as reorganized, under and in connection with the said plan of reorganization of June 30, 1875, were fraudulent and collusive, in that it was the intention and purpose of the parties to the plan of reorganization of June 30, 1875, to evade the requirements of the said Joint Resolution of May 31, 1870, with respect to the manner and places in which the said lands should be sold upon the foreclosure of the mortgage authorized by the said Joint Resolution of May 31, 1870, and this said intention and purpose was carried out by the parties to the said plan of reorganization and the various acts of the parties thereunder, and with the aid and assistence of the said consent decrees and orders of the court as aforesaid; that the said decrees of the said court were based in whole or in part upon representations that were erroneous in fact and in law, to wit, a statement contained in the petition dated August 4, 1875, and filed in said suit, and signed by the trustees under the said mortgage of July 1, 1870, namely, Jay Cooke and Charlemagne Tower, the said Tower having been substituted for the said John Edgar Thompson, to the effect that certain of the lands earned by the said Northern Pacific Railroad Company, although surveyed, could not be sold by the said company because of the refusal of the United States to issue letters patent thereon because of the failure of the said Northern Pacific Railroad Company to pay certain costs and charges thereon, and that therefore it was necessary that such lands be sold as an entirety, the said trustees well knowing that this statement was untrue, but upon which the court acted and promulgated its decree of August 6, 1875, excepting such lands from being sold in conformity with the requirements of the Joint

Resolution of May 31, 1870; and the said court based an order of January 11, 1876, upon a petition of the said George W. Cass, Receiver, dated January 11, 1876, wherein it was stated that the said Northern Pacific Railroad Company as it existed on April 24, 1875, had "ceased to act or to be," the said Cass meaning in, and by, such statement that the federal charter
22 granted to the said Northern Pacific Railroad Company under the said Act of July 2, 1864, had passed to the said Northern Pacific Railroad Company as reorganized under the said plan of reorganization of June 30, 1875, and the decrees of said court, which statement was untrue; that the sale of the said lands upon the foreclosure of the said mortgage of July 1, 1870, in the manner aforesaid, constituted a breach of the contract between the said Northern Pacific Railroad Company and the United States of America, as set out and contained in the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that the sales of the said lands in the manner aforesaid upon the foreclosure of the said mortgage of July 1, 1870, were in defiance of, and were in defeat of, the policy of the United States, as expressed in the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, with respect to the disposition by the United States of its public domain and the settlement and development of the territory adjacent to the line of the railroad of the said Northern Pacific Railroad Company and were to the illegal gain of the said Northern Pacific Railroad Company as reorganized, to the injury of your complaint.

X

That at all times between August 12, 1875, and March 22, 1882, the said Northern Pacific Railroad Company, as reorganized, conducted its business as if the company created by said Act of July 2, 1864, had ceased to exist, and made disposals of its lands, stocks and bonds, constructed portions of the railroad contemplated by the said Act of July 2, 1864, and held itself out to be and conducted its business as if it was a corporation that was distinct and different from the corporation created by said Act, as that company had existed prior to August 12, 1875, although at all times during such period said reorganized company claimed, but without authority, to be operating under said Act, and under the federal charter provided thereby, subject to all the rights and obligations to the United States imposed by said
23 Act, as modified and supplemented by said Joint Resolution of May 31, 1870; that after March 22, 1882, said reorganized company held itself out to be and conducted

its business generally on the basis that it was, when in fact it was not, the Northern Pacific Railroad Company created by said Act of July 2, 1864, and on the basis that its business was being conducted under the federal charter provided thereby, subject to said rights and obligations.

That subsequent to June 30, 1875, land grant limits were established by the Secretary of the Interior opposite portions of railroad constructed under said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, by the said Northern Pacific Railroad Company as reorganized, and patents and other muniments of title were issued by the administative officers of the United States for lands within said limits, in the name of the said Northern Pacific Railroad Company created by the Act of July 2, 1864, to the same extent and in the same manner as if said lands had been earned by said company.

That subsequent to August 12, 1875, the said Northern Pacific Railroad Company as reorganized under the said plan of reorganization of June 30, 1875, while claiming to be the Northern Pacific Railroad Company, the federal corporation, issued certain mortgages hereinafter referred to, certain of which mortgages were foreclosed in certain proceedings initiated in 1893 in the Circuit Court of the United States for the Eastern District of Wisconsin, as more fully hereinafter set forth, as a consequence of which said foreclosures and other proceedings collateral thereto, the Northern Pacific Railway Company, a Wisconsin corporation, one of the defendants named in this action, succeeded to by operation of law or otherwise, whatever rights, titles, interests and obligations either in law or in equity that were then held under and by virtue of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, or otherwise, by the said Northern Pacific Railroad Company created by the said Act of July 2, 1864, and/or the said
24 Northern Pacific Railroad Company as reorganized under the said plan of reorganization of June 30, 1875.

XI

That by deed dated March 22, 1882, Johnston Livingston, Frederick Billings, James K. Moorhead, John N. Hutchinson, George Stark, and John M. Denison, constituting said bondholders' committee appointed under the plan of reorganization of June 30, 1875, as parties of the first part, pretended to convey to the Northern Pacific Railroad Company, a corporation created and existing under the laws of the United States of America, as party of the second part, all and singular the railroad and property, and rights of property, together with all the rights,

privileges, liberties, immunities and franchises, including the franchise to be a corporation, and also all rights, interests, claims, demands, actions and causes of action of every nature and description required by or devolving upon the said parties of the first part, as such committee, under, by or through said foreclosure proceedings and sale made in pursuance of the decree therein, or in any other manner, or by any other means whatsoever; that at the time of the execution of said deed, the said Northern Pacific Railroad Company, the federal corporation created by the Act of July 2, 1864, was without officers to function for it; that it was without assets other than its federal franchise to be a corporation, and that it was without outstanding capital stock other than the capital stock that had been exchanged by the holders thereof for the common stock of the Northern Pacific Railroad Company as reorganized as aforesaid; that upon the setting up of the so-called Northern Pacific Railroad Company as reorganized, the capital stock therein, consisting of $51,000,000 of preferred stock and $49,000,000 of common stock, was the stock of that company or organization, and it was not then and it never came to be the stock of the Northern Pacific Railroad Company, the federal corporation created under the Act of July 2, 1864; that the execution of said deed of March 22, 1882 was without the authorization of, or the approval of, the stockholders and bondholders of the said Northern Pacific Railroad Company as reorganized, to the extent the approval of such stockholders and bondholders are necessary, or at all, and was an unsuccessful attempt of the said bondholders' committee to return to and place with the said Northern Pacific Railroad Company, the federal corporation and the holder and owner of the said federal franchise to be a corporation, the rights and properties which the said bondholders' committee acquired from the said Northern Pacific Railroad Company under and coincident with the said plan of reorganization of June 30, 1875, and the decrees and conveyances executed in connection therewith.

XII

That in the said plan of June 30, 1875, for the reorganization of the said Northern Pacific Railroad Company, provision was made that preferred stock be created in the said Northern Pacific Railroad Company as reorganized to the amount of $51,000,000 for the purpose of retiring the bonds issued under said mortgage of July 1, 1870, for paying interest thereon due and to become due up to and including July 1, 1878, at the rate of 8 per cent currency per annum, and for other purposes. The said plan pro-

vided that the preferred stock should be convertible at par into any lands belonging to the company, or thereafter to belong to it, in the State of Minnesota, and in the Territory of Dakota, east of the Missouri River, until default should occur in some of the provisions of the new first mortgage bonds, therein provided for, and such conversion should be an extinguishment of such stock, and that the proceeds of all sales of such lands, until such default, should be used likewise in extinguishment of such stock.

That under this said provision and at a time or times when the said Northern Pacific Railroad Company, as reorganized, was claiming to be functioning under the federal franchise to be a corporation provided for by Congress, and after large amounts of its preferred stock had been issued to retire certain of said bonds,

the said company accepted its preferred stock, so issued,
26 to the amount of $15,000,000, more or less, in exchange for
3,500,000 acres, more or less, situate in Minnesota and Dakota, east of the Missouri River, of the lands which Congress had granted to said Northern Pacific Railroad Company under the Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and thereafter said preferred stock, so exchanged, was cancelled; that the exchange of said granted lands for said capital stock of the said Northern Pacific Railroad Company as reorganized was a breach of the contract between the said Northern Pacific Railroad Company and the United States in that not any of said lands so exchanged or of the said stock was disposed of for the purpose of raising money to be used in the construction of said railroad and telegraph line as contemplated in said contract, but the said lands and the said stock were exchanged under and by virtue of, and in recognition of, and in perpetuation of the unlawful and illegal plan of reorganization of June 30, 1875, and the purposes thereof, and to the injury of the plaintiff; that large acreages of the lands so exchanged should have been sold at public sale in the States and Territories where situate, in single sections or subdivisions thereof to the highest and best bidder, upon foreclosure of the aforesaid mortgage of July 1, 1870.

XIII

That the final date fixed by Congress for the completion of the entire railroad and telegraph line including the branch line contemplated by the Joint Resolution of May 31, 1870, was July 4, 1879; that July 4, 1884, was the date upon which there should have become operative the requirement in the said Joint Resolution of May 31, 1870, that the lands granted by the said Act of

July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, should be subject to settlement and preemption, like other lands, at a price to be paid the said Northern Pacific Railroad Company, not exceeding $2.50 per acre; that on July 4, 1884, and thereafter there were within the exterior limits of the Northern Pacific land grant many million acres of lands, the quantity and descriptions of which are known
27 only to the said Northern Pacific Railway Company and/or its predecessors in interest, which should have been opened to settlement and preemption under and by virtue of the said requirement in the said Joint Resolution of May 31, 1870, but not any of the said lands were ever opened to settlement and preemption by the said Northern Pacific Railroad Company, or the said Northern Pacific Railroad Company as reorganized, or the said Northern Pacific Railway Company, as required by the said Joint Resolution of May 31, 1870, but to the contrary, large acreages of the said lands were, subsequent to July 4, 1884, sold by the said Northern Pacific Railway Company and/or its predecessors in interest to such persons and under such prices and such conditions as suited its or their pleasure; that the failure of each and all of the said companies to open any or all of the said lands to settlement and preemption was a breach of the contract contained in the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and in defeat of the policy of the United States with respect to the disposition of its public domain, as set out in the said Act and said Resolution.

XIV

That it was the intent and purpose of Congress in passing the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, that the properties, including the capital stock, lands, credits, and other assets of the said Northern Pacific Railroad Company, should and would be used primarily to build the main and branch line of railroad and telegraph contemplated by the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that a large part of the said properties, including the capital stock, lands, credits, and other said assets so provided for the said Northern Pacific Railroad Company were not so used either within the time specified by Congress for the completion of the said railroad or at all; that approximately 215 miles of the main line of the Northern Pacific railroad, and between Wallula, Washington, and Portland, Oregon, have
28 never been constructed, but to the contrary, while the said main line of the Northern Pacific railroad remained un-

completed between Wallula, Washington, and Portland, Oregon, numerous branch lines were constructed by the said Northern Pacific Railroad Company as reorganized under and by virtue of fraudulent and collusive contracts, which depleted the properties and credits which could and should have been devoted by the Northern Pacific Railroad Company to the construction of the said main line of railroad between Wallula, Washington, and Portland, Oregon, said depletion being in violation of the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and in the following manner, to wit, that in 1880, one Henry Villard through the purchase of stock in the said Northern Pacific Railroad Company as reorganized, and as a consequence of a certain suit filed on March 24, 1881, by himself, in the Superior Court of the City of New York, against the said Northern Pacific Railroad Company and certain of its officers and directors to restrain them from issuing certain of the capital stock of the said Northern Pacific Railroad Company, which had been set aside under the provisions of the said plan dated June 30, 1875, for the reorganization of the said Northern Pacific Railroad Company, obtained the control of the said Northern Pacific Railroad Company as reorganized; that in September, 1881, the said Henry Villard was elected President of the said Northern Pacific Railroad Company as reorganized; that on June 28, 1881, the said Henry Villard and certain other persons caused to be organized under the laws of the State of Oregon, the Oregon and Trans-Continental Company; that one of the objects of the said Oregon and Trans-Continental Company was to acquire and to hold a controlling interest in the stocks of the said Northern Pacific Railroad Company as reorganized and the Oregon Railway and Navigation Company; that subsequent to June 28, 1881, the said Oregon and Trans-Continental Company did acquire a controlling interest in the capital stock issued by the said Northern Pacific Railroad Company as reorganized, and thereafter the said
29 Oregon and Trans-Continental Company, and by reason of its control of such stock of the said Northern Pacific Railroad Company, did cause the said Northern Pacific Railroad Company to enter into certain tripartite contracts with the said Oregon and Trans-Continental Company and with certain railroad companies, under which contracts provisions were made for the construction by the Northern Pacific Railroad Company as reorganized of certain railroads as branch lines to the main line of railroad constructed under the Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that the said branch line railroads were constructed

for certain railroad companies which were organized by the said Oregon and Trans-Continental Company or the control of which was otherwise acquired by the said Oregon and Trans-Continental Company, and in which the capital stock of the said railroad companies was placed in the control of the said Northern Pacific Railroad Company as reorganized; that the said Oregon and Trans-Continental Company provided the moneys for the construction of the said branch line railroads, and as a consideration therefor received from the said companies $20,000 in bonds of the said branch line railroads for each mile of railroad constructed for the said branch line railroads under the said tripartite agreements; that under the said tripartite contracts the Oregon and Trans-Continental Company obligated the said Northern Pacific Railroad Company as reorganized to pay to the said branch line companies a minimum net annual income of $1,400 per mile of operated road, irrespective of the earnings of the said railroads; that approximately 504 miles of such branch line railroads were so constructed under the said tripartite agreements, and approximately $11,000,000 of the said branch line bonds were issued by the said branch line companies to the said Oregon and Trans-Continental Company, and in connection with all of said bonds the said Northern Pacific Railroad Company as reorganized was required under the said tripartite agreements to pay the said branch line companies a net annual income of $1,400 per mile of operated road per annum and as aforesaid; that under the said tripartite agreements, the said branch lines were constructed by and under the supervision of the Engineering Department of the said Northern Pacific Railroad Company as reorganized, with moneys furnished by the said Oregon and Trans-Continental Company; that the cost to the said Oregon and Trans-Continental Company of constructing the said branch line railroads was far below the par value of the said branch line bonds which the said Oregon and Trans-Continental Company received from the said branch line companies for supplying the moneys for the construction of the said branch line railroads; that the said branch line railroads and all of them were constructed through sparsely settled territory where it was not reasonably to be expected that the net revenues to be earned by the said branch lines would be sufficient to pay the fixed charges of $1,400 per mile per annum which the said Northern Pacific Railroad Company as reorganized was obligated to pay under the said tripartite agreements for the construction of said branch lines; that the said tripartite agreements were collusive and fraudulent devices under and by which the said Oregon and Trans-Con-

tinental Company received at the expense of the said Northern Pacific Railroad Company as reorganized unconscionable and illegal profits, in violation of the provisions of the contract between the United States and the said Northern Pacific Railroad Company, as set out in the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and at a time when the said Northern Pacific Railroad Company as reorganized had not completed the main line of railroad between Wallula, Washington, and Portland, Oregon, as required by the said contract, and at a time when the properties, including the capital stock, lands, credits, and other assets of the Northern Pacific Railroad Company as reorganized should have been used by the said company to construct the said portion of the said main line of railroad from Wallula, Washington, to Portland, Oregon; that the said branch line bonds issued as aforesaid subsequently were retired by the Northern Pacific Railroad Company through exchange for bonds issued by the said Northern Pacific Railroad Company as reorganized, under its consolidated mortgage of December 2, 1889, hereinafter
31 referred to.

That the said Northern Pacific Railroad Company, as reorganized, but without the consent of Congress, and without completing the said railroad and telegraph line contemplated by the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, pledged its assets, including the land grant provided by the said Act and the said Resolution to secure interest-bearing bonds issued by certain railroad and other companies which were not operating under the provisions of the Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, the names of the said companies being set out in the said mortgage of December 2, 1889, a copy of which is Exhibit L attached to this bill; and in the Plan of Reorganization of March 16, 1896, hereinafter referred to, a copy of which is Exhibit M attached to this bill.

XV

That it was an intent and purpose of Congress in making the grant of lands to the said Northern Pacific Railroad Company under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, that the said lands granted thereby would be sold under bona fide sales for the purpose of raising funds to aid in the construction of the said railroad contemplated and provided for by the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that large areas of the said granted lands

were diverted from such purposes by the said Northern Pacific Railroad Company as created by the said Act of July 2, 1864, and by the said Northern Pacific Railroad Company as reorganized, in violation of the contract between the said Northern Pacific Railroad Company and the United States, as set out and contained in said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870.

XVI

That subsequent to June 30, 1875, the said Northern Pacific Railroad Company, as reorganized, and while pretending to be and while well knowing that it was not the said Northern Pacific Railroad Company created by the Act of July 2, 1864, placed upon the land grant made by said Act of July 2, 1864, as modified and supplemented by said Joint Resolution of May 31, 1870, certain mortgages, and thereafter filed with the Secretary of the Interior a copy of each of the said mortgages, the said mortgages being as follows:

Date	Designation	Amount authorized	Trustee
May 1, 1879	First Mortgage, Missouri Division.	$2,500,000	Farmers' Loan & Trust Company, New York City.

A copy of said mortgage is attached hereto as Exhibit G.

September 1, 1879	First Mortgage, Pend O'Reille Division.	$4,500,000	Farmers' Loan & Trust Company, New York City.

A copy of said mortgage is attached hereto as Exhibit H.

January 1, 1881	General First Mortgage	$25,000 per mile.	Central Trust Company, New York City.

A copy of said mortgage is attached hereto as Exhibit I.

November 20, 1883	General Second Mortgage	$20,000,000	Farmers' Loan & Trust Company, New York City.

A copy of said mortgage is attached hereto as Exhibit J.

December 1, 1887	General Third Mortgage	$12,000,000	Farmers' Loan & Trust Company, New York City.

A copy of said mortgage is attached hereto as Exhibit K.

December 2, 1889	Consolidated Mortgage	$160,000,000	Farmers' Loan & Trust Company, New York City.

A copy of said mortgage is attached hereto as Exhibit L.

XVII

That subsequent to July 4, 1879, with moneys received from the sales of bonds under the aforesaid mortgages and with moneys otherwise received, the main line railroad contemplated by the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, was constructed
33 from Bismarck, North Dakota, to Wallula, Washington, and from Portland, Oregon, to a point in Oregon opposite Kalama, Washington, and the branch line thereof was constructed from Tacoma, Washington, to Ainsworth, Washington.

XVIII

That on August 15, 1893, P. B. Winston, the Farmers' Loan & Trust Company, and others, filed a bill in the Circuit Court of the United States for the Eastern District of Wisconsin, praying for the appointment of a Receiver for the Northern Pacific Railroad Company and its railroad system, and by order of the court of the same date, to wit, August 15, 1893, Henry C. Payne, Thomas F. Oakes and Henry C. Rouse were appointed Receivers for said company; that by a bill of complaint sworn to on October 16, 1893, and filed in the same court, by the Farmers' Loan & Trust Company against the Northern Pacific Railroad Company and others, and the Receivers therefor, it was alleged that under the aforesaid general second mortgage of November 20, 1883, there were outstanding bonds issued by the Northern Pacific Railroad Company in the aggregate amount of $19,216,000; that the said company had defaulted in making the payment of the interest on the said bonds; that under the aforesaid general third mortgage of December 1, 1887, there were outstanding bonds issued by the Northern Pacific Railroad Company to the aggregate amount of $11,461,000; that under the aforesaid consolidated mortgage of December 2, 1889, there were outstanding bonds issued to the aggregate amount of $62,443,000; that default had been made in the payment of the interest on the said bonds; that under the said bill a Receiver was asked for and other relief prayed; that by an order of the court dated October 18, 1893, the aforesaid cause was consolidated with the said cause of Winston et al. against the Northern Pacific Railroad Company, and the said Thomas F. Oakes, Henry C. Payne and Henry C. Rouse were appointed Receivers for the Northern Pacific Railroad Company in the consolidated cause; that by an amended and supplemental bill filed in the consolidated cause by the Farmers' Loan & Trust Company under date of December 8, 1893, it was
34 alleged that in addition to the defaults that occurred in

connection with the payment of interest on the bonds secured by the general second and the consolidated mortgages, the said Northern Pacific Railroad Company was in default in connection with the payment of interest upon the general third mortgage bonds.

That thereafter and under and by virtue of certain consent decrees dated April 27 and April 28, 1896, entered by the said Circuit Court of the United States for the Eastern District of Wisconsin, in the said consolidated cause, the said mortgages of November 20, 1883, December 1, 1887 and December 2, 1889 were foreclosed, and as a consequence of such foreclosures and certain sequestration proceedings supplemental thereto, or by operation of law or otherwise, all of the properties then held by the said Northern Pacific Railroad Company, or the said Northern Pacific Railroad Company as reorganized or both, whether covered by the said mortgages or not, passed into the possession and control of the Northern Pacific Railway Company, one of the defendants named in this bill, and thereafter the said Northern Pacific Railway Company claimed to own and did exercise complete ownership over the said properties and all of them and then claimed and now claims as successor to the said Northern Pacific Railroad Company to be entitled to receive further and additional lands from the United States under and by virtue of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870.

That the United States was not a party to the said consolidated cause or to any of the proceedings had in connection therewith; that the said decrees were caused to be entered in the said consolidated cause by a Reorganization Committee representing certain bondholders and stockholders, of which Reorganization Committee, Edward D. Adams was Chairman, the said committee acting under and in pursuance of the provisions of a plan dated March 16, 1896, for the reorganization of the Northern Pacific Railroad Company, under which J. P. Morgan and Company were the reorganization managers; that a copy of the said plan is attached to this bill of complaint and made a part hereof and marked Exhibit M.

That said plan of reorganization of March 16, 1896, was an agreement under and by which the parties thereto, acting upon the authority contained therein and pretending that the stocks, bonds, properties and obligations referred to in said plan were the stocks, bonds, properties and obligations of the said Northern Pacific Railroad Company, when in law or in equity they were the stocks, bonds, properties and obligations of the said Northern Pacific Railroad Company as reorganized under the said plan

of reorganization of June 30, 1875, undertook on such a basis to reorganize and did reorganize the affairs of the said Northern Pacific Railroad Company by means of the said Northern Pacific Railway Company, one of the defendants named herein.

That it was the intent and purpose of the subscribers to the said plan to provide a successor company for the said Northern Pacific Railroad Company, and to obtain for the successor company through purchase upon foreclosure of one or more of the said mortgages of November 20, 1883, December 1, 1887, and December 2, 1889, all of which mortgages were in default on March 16, 1896, or by other means, all of the properties referred to in the said plan, including the grant of lands made by Congress to the said Northern Pacific Railroad Company under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, for the use and benefit of, and ownership by, the said successor company, through the interchange of securities to be issued by the said successor company for the securities issued in the name of the said Northern Pacific Railroad Company and otherwise, and as provided by the said plan; that the said plan of reorganization of March 16, 1896, contemplated and provided that upon the acquisition by the said successor company of the said securities of the said Northern Pacific Railroad Company, the successor company would use the said purported securities of the said Northern Pacific Railroad Company as a medium by which the said
26 successor company could and would acquire the said purported properties of the said Northern Pacific Railroad Company.

That under the said plan of reorganization of March 16, 1896, it was provided that the stock in the successor company would be preferred stock in the amount of $75,000,000 and common stock in the amount of $80,000,000, and that the successor company would issue bonds to the amount of $190,000,000, said bonds to be used for the conversion of the purported securities of the said Northern Pacific Railroad Company and otherwise, and as more fully detailed in the said plan, and that the said bonds to be issued by the successor company would be secured in part by the lands granted by Congress under the said Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, and then purported to be owned by the Northern Pacific Railroad Company and then estimated as indicated in said plan to be about 43,000,000 acres.

That the said plan of reorganization of March 16, 1896, was a continuation, as modified, of a plan for the reorganization of the Northern Pacific Railroad Company that had been entered

into prior to March 16, 1896, under which the Great Northern Railway Company was a party, and under which it was agreed that the holders of certain of the bonds issued in the name of the Northern Pacific Railroad Company should obtain a foreclosure of the said mortgages of November 20, 1883, December 1, 1887, and December 2, 1889, and would obtain thereunder the sale of the railroad properties and franchises covered by the said mortgages and would cause the same to be bid in and purchased by a committee of bondholders or their agents for the benefit of all the holders of the outstanding bonds secured by the mortgages so foreclosed and would cause a reorganization of the Northern Pacific Railroad Company's franchises and properties as a new corporation, either under the acts and joint resolutions of Congress relating to the Northern Pacific Railroad Company or under some other proper and sufficient legislation of the United States, or of some one or more States,
37 which plan was held to be illegal by the United States Supreme Court in the decision of March 30, 1896, in Pearsall v. Great Northern Railway Company, 161 U. S. 646, for conflict with a Minnesota statute pertaining to consolidations of competing railroad lines; that Edward D. Adams, as chairman of the committee for the reorganization of the Northern Pacific Railroad Company, and J. P. Morgan and Company were parties to the said plan for the reorganization of the Northern Pacific Railroad Company that was before the Supreme Court of the United States in Pearsall v. Great Northern Railway Company, supra; that in 1895, the said Edward D. Adams, who was then chairman of the said committee for the reorganization of the Northern Pacific Railroad Company, was elected President of the Superior and St. Croix Railroad Company, a Wisconsin corporation; that the house of J. P. Morgan and Company was represented upon the Board of Directors of the Superior and St. Croix Railroad Company during the year 1895.

That said plan was published on March 16, 1896, and was thereupon carried into effect and was consummated; that for the purpose of carrying out the said plan, and in pursuance of the objects contemplated thereby, the name of the Superior and St. Croix Railroad Company was on July 1, 1896, changed to the Northern Pacific Railway Company, and thereupon the capitalization of the said company was increased from $5,000,000 to $155,000,000, and provision was made for the issuance of bonds by the said Northern Pacific Railway Company in the amount of $190,000,000, in furtherance of the provisions of the said plan of reorganization of March 16, 1896.

That by said decrees of foreclosure entered on April 27, and 28, 1896, in the said consolidated cause and under which the

said mortgages of November 20, 1883, December 1, 1887, and December 2, 1889, were foreclosed, certain properties then indicated as the properties of the Northern Pacific Railroad Company, but which in law or in equity were the properties of the said Northern Pacific Railroad Company as reorganized, including certain lands granted by the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of
38 May 31, 1870, were ordered to be sold, and subsequently thereto Alfred L. Cary, as Special Master, caused to be published notices that sales of the said properties would be held upon certain days in the month of July, 1896; that at a meeting of the Board of Directors of the said Northern Pacific Railway Company held on July 1, 1896, and upon an announcement made to the said Board that, whereas under the reorganization plan of March 16, 1896, J. P. Morgan and Company held securities of the Northern Pacific Railroad Company which they proposed to use in the purchase of the railroad franchises and property at the sales under the said foreclosure decrees or upon the request of the Northern Pacific Railway Company in exchange for its capital stock and bonds, to transfer the said Northern Pacific railroad securities to the Northern Pacific Railway Company to enable the Northern Pacific Railway Company to purchase at the foreclosure sales the rights, property, and franchises of the Northern Pacific Railroad Company, a resolution was adopted that the Northern Pacific Railway Company enter into contracts with J. P. Morgan and Company, reorganization managers, for the said securities and for the Northern Pacific Railway Company to use these securities to purchase the said purported railroad, property, and franchises of the Northern Pacific Railroad Company, and that the president and secretary of the Northern Pacific Railway Company were authorized to attend the judicial sales and bid in the said purported Northern Pacific railroad property to the extent of the said purported securities of the said Northern Pacific Railroad Company then controlled by the Northern Pacific Railway Company, and in payment therefor to transfer and deliver any or all of the purported stocks, bonds, or other securities of the said Northern Pacific Railroad Company; that at a Board of Directors' meeting of the Northern Pacific Railroad Company held on July 11, 1896, the President of the Northern Pacific Railway Company was authorized to enter into an agreement with J. P. Morgan and Company, as reorganization managers, for the acquisition of the purported securities and purported stock of the Northern Pacific Railroad Company; that on July 13,
39 1896, an agreement was entered into between the said

Northern Pacific Railway Company and the said J. P. Morgan and Company, a copy of which agreement is attached to this bill of complaint and marked Exhibit N, under which the said Northern Pacific Railway Company agreed to issue and to deliver to the said J. P. Morgan and Company, its preferred stock to the amount of $75,000,000, its common stock to the amount of $80,000,000, its prior lien bonds to the amount of $130,000,000, and its general lien bonds to the amount of $60,000,000; that the said agreement contemplated and provided that the said J. P. Morgan and Company, reorganization managers, would from time to time cause to be vested in the Northern Pacific Railway Company the ownership of the aforesaid stocks, bonds, and other property representing the system of the Northern Pacific Railroad Company so far as the same shall have been acquired by the reorganization managers in the performance of said plan and agreement of reorganization of March 16, 1896, it being intended that the said Northern Pacific Railway Company should be the suitable agency contemplated in the plan of March 16, 1896, for the ownership and operation of the properties acquired and to be acquired pursuant to said plan and agreement; that thereafter and during the month of July, 1896, the said purported properties of the said Northern Pacific Railroad Company were offered for sale by the said Special Master under the said foreclosure decrees, and the said purported properties of the said Northern Pacific Railroad Company, including the said lands granted by Congress to the Northern Pacific Railroad Company, which the said Northern Pacific Railroad Company then purported to own except certain of the said lands situate in Minnesota and Dakota, east of the Missouri River, were bid in and were acquired by the said Northern Pacific Railway Company, and payment was made therefor by the said Northern Pacific Railway Company with the purported securities of the said Northern Pacific Railroad Company and in the manner and for the purposes contemplated by the said plan of reorganization of March 16, 1896.

That by the said Joint Resolution of May 31, 1870, Congress authorized the Northern Pacific Railroad Company to issue its bonds and to secure the same by mortgage on its property, including the lands granted by the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that in the said Joint Resolution of May 31, 1870, it was provided with respect to the said mortgage authorized thereby and in furtherance of the policy of Congress as expressed in the said Joint Resolution of May 31, 1870:

"and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged

lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder."

That on April 28, 1896, each and all of the said mortgages of November 20, 1883, December 1, 1887, and December 2, 1889, did cover and embrace all of the lands granted by Congress to the said Northern Pacific Railroad Company by the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, that were on April 28, 1896, owned or claimed by the said Northern Pacific Railroad Company and/or by the said Northern Pacific Railroad Company as reorganized, the same being 35,000,000 acres, more or less, situate in Wisconsin, North Dakota, Wyoming, Montana, Idaho, Washington and Oregon, the said lands being covered by certain purported claimed prior existing liens, and the portions of said lands situate in Minnesota and Dakota, east of the Missouri River, being subject to certain supposed rights of preferred stockholders of the Northern Pacific Railroad Company as reorganized, in such lands, such rights being held under and by virtue of the aforesaid plan of reorganization of June 30, 1875; that all of the said lands granted by Congress to the said Northern Pacific Railroad Company under the said Act of July 2, 1864, as modified and supplemented by the said joint Resolution of May 31, 1870, and embraced in and covered by the said mortgages were required to be sold upon the foreclosure of any one or more thereof under bona fide sales to third
41 persons in compliance with the provisions of the said Joint Resolution of May 31, 1870, to wit, "at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder."

That under and by virtue of the said plan of reorganization of March 16, 1896, and the said consent decrees in the said consolidated cause, the said mortgages of November 20, 1883, December 1, 1887, and December 2, 1889, were foreclosed and the said lands then the property of the said Northern Pacific Railroad Company as reorganized, and which had been granted by Congress to the said Northern Pacific Railroad Company under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and as embraced in and covered by the said mortgages, except certain of the said lands

situate in Minnesota and in Dakota, east of the Missouri River, were acquired by the said Northern Pacific Railway Company under and by virtue of the said plan of reorganization of March 16, 1896 and the said consent decrees and otherwise; that upon the foreclosure of the said mortgages, not any of the said lands irrespective of whether they were located east or west of the Missouri River were sold under bona fide sales as all of said lands should have been sold under the provisions of the said Joint Resolution of May 31, 1870; that it was not intended by the proponents of the said plan of reorganization of March 16, 1896, as expressed therein, that any of the said granted lands would upon the foreclosure of any one or more of the said mortgages be sold under bona fide sales to third persons; that the said granted lands were upon the foreclosure of the said mortgages, and as a result of the so-called sales had in connection therewith, transferred to the said Northern Pacific Railway Company in exchange for certain purported securities of the Northern Pacific Railroad Company, which the said Northern Pacific Railway Company had acquired under and by virtue of the said plan of reorganization of March 16, 1896; that the portions of
42 the said granted lands situate in Minnesota and in Dakota, east of the Missouri River, were acquired by the said Northern Pacific Railway Company as a consequence of certain supplemental proceedings in the said consolidated cause and under and by virtue of certain decrees entered therein; that the said lands situate in Minnesota and in Dakota, east of the Missouri River, were paid for by the said Northern Pacific Railway Company out of a deficiency judgment which the said Northern Pacific Railway Company held against the said Northern Pacific Railroad Company under and by virtue of the proceedings had in the said consolidated cause.

That the said plan of reorganization of March 16, 1896, as contemplated and as consummated, was collusive and fradulent against the United States, in that it was the intent and purpose of the subscribers to the said plan to acquire for the successor company contemplated by the said plan the said 35,000,000 acres, more or less, of the lands contained in the land grant made by the Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and in evasion of and in defiance of the provisions of the said Joint Resolution of May 31, 1870, which required upon the foreclosure of the mortgage authorized thereby the mortgaged lands covered by said mortgage would be sold under bona fide sales to third persons "at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous

notice, in single sections or subdivisions thereof, to the highest and best bidder," and the said illegal and unlawful intent and purpose of the said plan of March 16, 1896, was carried into effect under and by virtue of the acts of the persons who were parties thereto and the various consent decrees entered by the Circuit Court of the United States for the Eastern District of Wisconsin in the said consolidated cause or otherwise.

That upon the acquisition by the said Northern Pacific Railway Company of the said properties, including the said lands granted to the said Northern Pacific Railroad Company under the said Act of July 2, 1864, as modified and supplemented
43 by the said Joint Resolution of May 31, 1870, the said granted lands and all of them so acquired, being approximately 35,000,000 acres, were subjected to and placed under the prior lien and the general lien mortgages issued by the said Northern Pacific Railway Company, and thereafter the said lands were dealt with and/or sold (except as otherwise indicated in this bill) by the said Northern Pacific Railway Company at such times, to such persons, at such places, in such quantities, and at such considerations as suited its pleasure, and the said company received therefor values in excess of the prices the lands would have brought had they been sold to third persons under bona fide sales upon the foreclosure of the said mortgages, all of which was in violation of the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and in defeat of the policy of the United States as expressed in said Joint Resolution of May 31, 1870 and otherwise, with respect to the disposition of its public domain.

XIX.

That the total original cost of constructing the main line of said Northern Pacific railroad from Ashland, Wisconsin, to Wallula, Washington, and from Portland, Oregon, to Tacoma, Washington, and the said branch line of the said Northern Pacific railroad from Tacoma, Washington, to Ainsworth, Washington, was approximately $68,000,000; that from the lands granted by Congress under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, to aid in the construction of the railroad and telegraph line contemplated thereby, as the result of sales, rentals and otherwise the said Northern Pacific Railway Company and its predecessors have received values in excess of $200,000,000, much of which was wrongfully received as in this bill elsewhere alleged.

XX

That on April 11, 1921, the Supreme Court of the United States decided the case of United States v. Northern Pacific Railway Company, 256 U. S. 51; that thereafter and in response
44 to the said decision, the Commissioner of the General Land Office undertook the making of an adjustment of the said land grants made to the Northern Pacific Railroad Company; that on June 5, 1924, the Congress of the United States passed a Joint Resolution (43 Stat. 461), creating a Joint Committee to investigate the said Northern Pacific land grants and the facts and the law pertaining thereto; that the said committee met from time to time and heard witnesses, whose testimony was transcribed and printed as a part of the record of the hearings held by the said Joint Committee; that under a tentative adjustment dated March 5, 1925, the Commissioner of the General Land Office indicated the said land grants to be deficient as of the date December 31, 1921; that by letter of March 6, 1925, the Secretary of the Interior transmitted to the said Joint Committee of Congress, and as a preliminary report, a copy of the said adjustment of March 5, 1925; that thereafter and by letter of March 25, 1925, the Acting Secretary of the Interior transmitted to the said Joint Committee his review and comments upon the said tentative adjustment of March 5, 1925; that by the said Joint Resolution of June 5, 1924, the Secretary of the Interior was directed to withhold his approval of the adjustment of the said Northern Pacific land grants, until after Congress shall have made a full and complete inquiry into the said land grants and the acts supplemental thereto for the purpose of considering legislation to meet the respective rights of the Northern Pacific Railroad Company and its successors and the United States; that the said Northern Pacific Railway Company and/or its predecessors in interest have received of and from the plaintiff under the said Act of July 2, 1864, 38,000,000 acres of lands, more or less, and under the said Joint Resolution of May 31,1870, 1,600,000 acres of lands, more or less, or a total of 39,600,000 acres of lands, more or less, of which acreages large quantities have been received wrongfully as in this bill alleged; that the Secretary of the Interior has not found that a deficiency exists in the said land grants; that in the said letter of March 25, 1925,
45 the said Acting Secretary of the Interior left undecided certain matters which are necessary to be decided before certain of the respective rights of the United States and the said Northern Pacific Railway Company can be ascertained, and recommended to said committee that such matters be inquired

into; that by the Act of June 25, 1929 (46 Stat. 41), the Congress of the United States directed among other things the institution of litigation for the purpose of having determined the various questions of law and fact heard by the said Joint Committee, including the said letter of March 25, 1925, and the contents thereof, and otherwise.

That the administration of the said land grants was committed by Congress to the Secretary of the Interior, and the said land grants have been under the administration of the Secretary of the Interior; that by the Act of June 25, 1929, the Secretary of the Interior was directed to withhold the issuance of patents and muniments of title under the Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, until the litigation contemplated by said Act shall have been finally determined; that in addition to large areas of lands that were properly credited under the said Acts, by the Secretary of the Interior, there were large areas of lands, which through errors of fact and of law and by reason of fraud practiced upon the Secretary of the Interior, and otherwise, were credited by him under the said land grants, and that as a consequence of the said errors of fact and of law and of the said fraud practiced upon the Secretary of the Interior, and otherwise, the said Northern Pacific Railway Company although it has already been overcompensated in lands by the United States is now, and for some time past has been, wrongfully asserting a claim to receive additional and further acreages in satisfaction of the said land grants, when in fact and in law neither the said Northern Pacific Railway Company nor its predecessors in interest are entitled to receive any additional acreages under the said land grants, as an adjustment by this Court of the said land grants and a determination of the matters and things complained of in this bill will show.

46 XXI

That the Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, provided therein for a grant of lands to the said Northern Pacific Railroad Company consisting of every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it should pass through any State, the said lands upon the fixation of limits therefor being the primary lands or lands within the primary limits of said grant; that for lands lost to the railroad company

within the said primary limits, and for the reasons more fully set forth in the said Act of July 2, 1864, the said Northern Pacific Railroad Company was entitled under the provisions of said Section 3 thereof to select other lands under the direction of the Secretary of the Interior, in alternate sections, in satisfaction of losses sustained within the primary limits, not more than ten miles beyond the limits of the alternate sections contained in the primary limits, the said ten-mile limits being referred to herein as the first indemnity limits of the Northern Pacific land grant; that for all mineral lands in the said primary limits excluded from the operation of the Act, the said Northern Pacific Railroad Company was entitled to make lieu selections within fifty miles of the line of the said railroad; that under the said Joint Resolution of May 31, 1870, Congress provided that the said Northern Pacific Railroad Company should locate and construct under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound,

"and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time
47 of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four."

That the said belt or strip provided for as aforesaid by the said Joint Resolution of May 31, 1870, is referred to herein as the second indemnity limits of the said Northern Pacific land grant; that within the said second indemnity limits, the said Northern Pacific Railroad Company, or its successors, was entitled to make indemnity selections only for lands that were lost to it subsequent to July 2, 1864, in the primary limits of the grant, and prior to the filing of its respective maps of definite

location, and under the said Joint Resolution of May 31, 1870, it was necessary that the said selections in lieu of the said losses should be made in the same State or Territory in which occurred the said losses in the said primary limits; that within the said second indemnity limits of the said Northern Pacific land grant the United States has withdrawn for governmental purposes, which withdrawals are now in full force and effect, certain odd-numbered sections within the exterior boundaries of the second indemnity limits of the said Northern Pacific land grant, and the said lands so withdrawn are the property of the United States; that the said withdrawals of the said odd-numbered sections were made at times when there were within the said second indemnity limits ample and sufficient lands within the odd sections thereof, and separate and apart and distinct from the said withdrawn lands, to satisfy each and all of the losses, if any existed, that the said Northern Pacific Railway Company and/or its predecessors in interest were entitled to have satisfied in the said second indemnity limits at the time of the said
48 withdrawals, and the said withdrawals were and are valid withdrawals against any claim of the said Northern Pacific Railway Company to any of the lands embraced therein; that the said lands so withdrawn by the United States as aforesaid are owned in fee simple by the United States, and the said lands have been under administration by the United States for many years, and during the course of this administration, large sums of money have been expended thereon for the preservation, development, and protection of the said lands as more fully hereinafter set forth; that the said lands and the respective dates on which they were withdrawn for governmental purposes are set out and described in the list attached to and made a part of this bill of complaint and marked Exhibit O.

That the said Northern Pacific Railway Company contending that a deficiency exists in the said land grants and in furtherance of such contention has filed and recorded with the officers of the Interior Department certain claims under and by virtue of which it is asserting a right under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, to acquire the aforesaid odd-numbered sections, among others, within the said second indemnity limits of the said land grants, which sections have been withdrawn for Governmental purposes as aforesaid; that the said claims of the said Northern Pacific Railway Company, as filed with the officers of the Interior Department as aforesaid and otherwise, nothwithstanding that the said claims are without merit, as an adjustment of the said land grants by this Court will show, con-

stitute a cloud upon the title of the United States to the said odd-numbered sections within the said second indemnity limits of the said land grants which have been withdrawn for governmental purposes as aforesaid, which cloud your complainant is entitled to have removed.

That the said Northern Pacific Railway Company contending that a deficiency exists in the said land grants and in furtherance of such contention is now asserting the right under the provisions of the Act of July 2, 1864, as modified and supple-
49 mented by the said Joint Resolution of May 31, 1870, by certain claims filed and recorded with the officers of the Interior Department, to acquire in satisfaction of the said land grants and the acreages thereof, all of the nonmineral lands situate within all of the odd-numbered sections in the first and in the second indemnity limits of the said land grants, all of which lands are owned in fee simple by the United States; that the said claims of the said Northern Pacific Railway Company, as filed and recorded with the officers of the Interior Department as aforesaid, and otherwise, are without merit, as an adjustment of the said land grants by this Court will show, but nevertheless they constitute a cloud upon the title of the United States to the said odd-numbered sections within the said first indemnity limits and within the said second indemnity limits, which cloud your complainant is entitled to have removed; that the descriptions of the lands so claimed by said Northern Pacific Railway Company, both those withdrawn for Government reservations and those not withdrawn, which are included in the second indemnity limits, are set forth in the said Exhibit O and Exhibit P, attached to and made a part hereof, the dates of the withdrawals being shown thereon, and the descriptions of the lands so claimed by said company, both those withdrawn for Government reservations and those not withdrawn, which are embraced within the first indemnity limits, are set forth in Exhibit Q, attached to and made a part hereof, the dates of the withdrawals being shown thereon.

XXII

That by Section 3 of the Act of May 5, 1864 (13 Stat. 66), a grant of public lands was made by the United States to the State of Wisconsin to aid in the construction of a railroad from Portage City, Berlin, Doty's Island, or Fon du Lac, as said State should determine, in a northwesterly direction to Bayfield, and thence to Superior; that the benefits of said grant were extended by the State of Wisconsin to the Portage, Winnebago & Superior Railroad; that thereafter, to wit, November 10, 1869, a map

of definite location for the entire route of said road, from Portage City through Ashland to Bayfield, thence to Superior, Wisconsin, was filed with the Interior Department by the said Portage, Winnebago & Superior Railroad Company, and thereafter the said company constructed a railroad from Portage to Ashland, but there never has been constructed by the said Portage, Winnebago & Superior Railroad Company, or otherwise, under the provisions of the said Act of May 5, 1864, a railroad from Ashland on through Bayfield and to Superior; that subsequent to the filing of the said map of definite location of November 10, 1869, and by reason thereof, on December 10, 1869, and February 2, 1870, withdrawals were made by the officers of the Interior Department of the public lands of the United States opposite the proposed railroad delineated by said map of definite location of November 10, 1869, for the said Portage, Winnebago & Superior Railroad Company, and thereupon and thereafter the said lands embraced within the said withdrawals ceased to be unreserved public lands of the United States and continued to remain in such withdrawn status until September 29, 1890, when the said lands so withdrawn were forfeited to the United States under the provisions of the Act of September 29, 1890 (26 Stat. 496).

That on July 5, 1882, and November 20, 1884, the Northern Pacific Railroad Company as reorganized filed with the Interior Department in the name of the Northern Pacific Railroad Company maps of definite location covering a railroad to be constructed between Ashland and Superior in the State of Wisconsin under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and thereafter a railroad, which is referred to in this paragraph as the Northern Pacific railroad, was constructed in the name of the said Northern Pacific Railroad Company by the said Northern Pacific Railroad Company as reorganized, under the said maps of definite location and substantially on the line established by the said maps of definite location; that the said Northern Pacific railroad as constructed between Ashland and Superior in the State of Wisconsin under said maps of definite location was upon the same general line as the railroad route of the said Portage, Winnebago & Superior Railroad Company, between Ashland, Bayfield, and Superior, and all parts thereof, as established by the said map of definite location of November 10, 1869; that no lands were earned or could be earned by the said Northern Pacific railroad under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, by reason of its construction between Ashland

and Superior, Wisconsin, along the said same general line of the Portage, Winnebago & Superior Railroad Company and extending from Ashland through Bayfield to Superior, established as aforesaid; that notwithstanding that no lands were or could be earned by the said Northern Pacific Railroad Company, or by the Northern Pacific Railroad Company as reorganized, or by the Northern Pacific Railway Company, under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, by or for the construction of the said railroad between Ashland and Superior, Wisconsin, upon the said same general line of the route of the Portage, Winnebago & Superior Railroad Company, and extending from Ashland through Bayfield to Superior, nevertheless, and heretofore, the said Northern Pacific Railway Company and/or its predecessors in interest have in error and through mistake received certain lands and patents thereto from the United States for the said railroad constructed between Ashland and Superior, and where the said constructed railroad was upon the same general line of the route of said Portage, Winnebago & Superior Railroad established as aforesaid; that the said certain lands and the patents thereto were obtained in lieu of losses which the said Northern Pacific Railway Company, or its predecessors in interest, claimed had resulted to it by reason of the said withdrawals of public lands in favor of the said Portage, Winnebago & Superior Railroad Company under and by reason of said map of definite location of November 10, 1869; that a schedule of the said lands by numerical description is attached to this bill of complaint and marked Exhibit R; that the
52 execution and delivery of said patents were without authority of law and occurred through error and mistake, and said patents were, and are, wrongful and void, all of which was at all times known to the said companies; that upon the issuance by the United States of the said patents to the Northern Pacific Railway Company, or to its predecessors in interest, and by virtue of the said patents, the said Northern Pacific Railway Company and/or its predecessors in interest assumed the complete ownership of the said lands, including the right of possession thereof, and including the right to lease and otherwise deal with the said lands and to sell the said lands to third persons; that notwithstanding that the said lands and each and all of them were wrongfully obtained from the United States by the said Northern Pacific Railway Company and/or its predecessors in interest, the said lands have never been reconveyed to the plaintiff herein, but on the contrary, extensive areas of the said lands have been sold to third persons by the said Northern Pacific

Railway Company and/or its predecessors in interest, and extensive areas of the said lands have been and now are retained by the Northern Pacific Railway Company for its use and benefit, notwithstanding that at all times mentioned herein the said lands and all of them were the property of the United States; that large sums of money have been received by the said Northern Pacific Railway Company and/or its predecessors in interest through sales and leases and from other revenues from the said lands, all of which moneys rightfully belong to your plaintiff.

XXIII

That on September 22, 1882, the Northern Pacific Railroad Company as reorganized filed in the name of the Northern Pacific Railroad Company with the Interior Department a map of definite location delineating a railroad to be constructed under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, between Portland, Oregon, and a point in Oregon opposite Kalama, Washington, a distance of approximately 36.60 miles; that subsequent to the filing of the said map of definite location, and by reason thereof,
53 a withdrawal of the public lands of the United States opposite the said map of definite location and for the entire length thereof was made by the officers of the Interior Department for the said Northern Pacific Railroad Company; that subsequent to the filing of the said map of definite location of September 22, 1882, and thereunder, the said Northern Pacific Railroad Company as reorganized constructed a railroad substantially along the line established by the said map of definite location from the said point in Oregon opposite Kalama, Washington, to the City of Portland, Oregon, except that for a distance of approximately one mile at or near Portland, Oregon, over the route where the said map of definite location of September 22, 1882, indicated that the said railroad would be constructed, and as delineated on said map, the said Northern Pacific Railroad Company and/or the said Northern Pacific Railroad Company as reorganized failed to construct any railroad or portion thereof under the provisions of the Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, or otherwise; that opposite the said map of definite location of September 22, 1882, and the portion thereof at or near Portland, Oregon, for a distance of approximately one mile, as aforesaid, and by reason of the failure of the said Northern Pacific Railroad Company and/or the said Northern Pacific Railroad Company as reorganized to construct a railroad

for the said approximate distance of one mile, the said Northern Pacific Railroad Company and/or the said Northern Pacific Railroad Company as reorganized did not and could not earn any of the lands or rights therein that had been withdrawn as aforesaid for the said Northern Pacific Railroad Company; that notwithstanding a railroad was not constructed over the approximate one mile at Portland, Oregon, by the said Northern Pacific Railroad Company, or the said Northern Pacific Railroad Company as reorganized, the Northern Pacific Railway Company and/or its predecessors in interest wrongfully received from the United States through error and through mistake and without authority
54 of law, through the issuance of patents and otherwise, for the said approximate one mile of railroad which was not constructed, certain of the lands of the United States within the primary limits of the grant provided by the Joint Resolution of May 31, 1870, and certain indemnity lands and certain lieu selections, and to the same extent and to the same purpose as if the said approximate one mile of railroad had been constructed; that by the Act of September 29, 1890, granted lands opposite unconstructed railroads were declared forfeited to the United States; that under the provisions of the Act of July 1, 1898 (30 Stat. 620), the said Northern Pacific Railway Company was permitted, in error and through mistake, and without authority of law, to relinquish to the United States certain of the place and indemnity lands which had been credited to it and/or its predecessors in interest by the United States in connection with and by reason of the said unconstructed mile of railroad at Portland, Oregon, and to receive in lieu thereof certain other lands of the United States, when in fact and in law the said Northern Pacific Railway Company or its predecessors in interest were without valid claim to, and were without right, title or interest in or to the said indemnity lands so relinquished, and were without right to receive from the United States the said selections in lieu of the said indemnity lands; that each and all of the patents that have been issued by the United States to each and all of the said lands and each and every claim of title to the said lands by the said Northern Pacific Railway Company or its predecessors in interest were and are null and void, all of which was at all times known or should have been known to said companies; that a schedule of the said lands as in this paragraph alleged is attached to this bill of complaint and marked Exhibit S; that upon the issuance by the United States of the said patents, or otherwise, the said Northern Pacific Railway Company or its predecessors in interest assumed a complete ownership of the said primary, indemnity and lieu lands, including the right of

possession thereof, and including the right to lease and otherwise deal with the said lands and to sell said lands to third persons; that notwithstanding that the said lands and each and all
55 of them were wrongfully obtained from the United States by the said Northern Pacific Railway Company, or its predecessors in interest, the said lands have never been reconveyed to the plaintiff herein, but to the contrary, extensive areas of the said lands have been sold to third persons by the said Northern Pacific Railway Company and/or its predecessors in interest, and extensive areas of the said lands have been retained by the said Northern Pacific Railway Company for its own use and benefit, notwithstanding that at all times mentioned herein the said lands and all of them were the property of the United States; that large sums of money have been received by the said Northern Pacific Railway Company and/or its predecessors in interest through sales and leases and from other revenues from the said lands, all of which money belong to your plaintiff.

XXIV

That in the administration of the said land grants made by said Act of July 2, 1864, as modified and supplemented by said Joint Resolution of May 31, 1870, and particularly the portion of the land grant opposite the line of constructed road southwesterly from Spokane, Washington, the Secretary of the Interior established a terminal at or near Ainsworth, Washington, and therefrom established a terminal line extending across the primary and indemnity limits of the said land grants, the purpose of the said terminal line being to bound the land grant limits and properly to delineate the same at the point or points where the said terminal line was laid down; that through error and mistake in the fixation of the said terminal line at Ainsworth, Washington, there were included within the said land grant limits and as parts and parcels of the said land grant certain of the lands of the United States which the said Northern Pacific Railway Company or its predecessors in interest did not and could not earn, said lands being situate without and beyond the limits of the said grant, as shown by a subsequent and correct fixation of the said terminal line by the Interior Department; that notwithstanding that the Northern Pacific Railway Company
56 or its predecessors in interest were not entitled to receive from the United States the said lands that had been included in the land grant limits by reason of the erroneous fixation of the said terminal line at Ainsworth, the said Northern Pacific Railway Company and/or its predecessors in interest were credited with the said lands and did receive portions thereof

through the issuance of patents, and otherwise, to the same extent and to the same purpose as if the said Northern Pacific Railway Company and its predecessors in interest had been entitled to receive said lands; that as a consequence of the fixation of the said terminal at Ainsworth, Washington, the said Northern Pacific Railway Company and its predecessors in interest have received from the United States 61,600 acres of land, more or less, it or they were not entitled to receive, all of which lands have been received by the Northern Pacific Railway Company or its predecessors in interest as primary lands, indemnity lands or lieu selections; that each and all of the patents that have been issued by the United States to each and all of the said lands, and each and every claim of title to the said lands by the said Northern Pacific Railway Company and/or its predecessors in interest were and are null and void, all of which was at all times known to the said companies; that a schedule of the said lands as in this paragraph alleged is attached to this bill of complaint and marked Exhibit T; that upon the issuance by the United States of the said patents, or otherwise, the said Northern Pacific Railway Company or its predecessors in interest assumed a complete ownership of the said primary, indemnity and lieu lands, including the right of possession thereof, and including the right to lease and otherwise deal with the said lands and to sell the lands to third persons; that notwithstanding that the said lands and each and all of them were wrongfully obtained from the United States by the said Northern Pacific Railway Company and/or its predecessors in interest, the said lands have never been reconveyed to the plaintiff herein, but to the contrary, extensive areas of the said lands have been sold to third per-
57 sons by the said Northern Pacific Railway Company and/or its predecessors in interest, and extensive areas of the said lands have been retained by the said Northern Pacific Railway Company for its own use and benefit, notwithstanding that at all times mentioned herein the said lands and all of them were the property of the United States; that large sums of money have been received by the said Northern Pacific Railway Company and/or its predecessors in interest through sales and leases and from other revenues from the said lands, all of which moneys belong to your plaintiff.

XXV

That in the administration of the said land grants contained in the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, the Secretary of the Interior upon the filing with him by the said Northern

Pacific Railroad Company, or the said Northern Pacific Railroad Company as reorganized, in the name of the said Northern Pacific Railroad Company, of maps of definite location showing its railroad line to be constructed extending across Montana and Idaho, under the said Act and the said Resolution, established land grant limits opposite the said railroad as shown by the said maps of definite location; that in doing so the said land grant limits were fixed by the Secretary of the Interior at greater distances from the said line of railroad, as shown by the said maps of definite location, than they should have been, with the result that certain lands of the United States were included within the primary limits of the grant that should have been included only within the first indemnity limits; that certain lands were included within the first indemnity limits of the grant that should have been included only within the second indemnity limits, and that certain lands were included in the second indemnity limits of the grant that should not have been included in any of the said limits of the said land grant; that the said Northern Pacific Railway Company and/or its predecessors in interest did not earn and could not earn as lands within the primary limits the said lands that were erroneously embraced therein, and which
58 should have been included only within the first indemnity limits; that certain of the said lands that were improperly included in the primary limits of said grant were used as bases by the said Northern Pacific Railway Company or its predecessors in interest for the making of indemnity selections, without authority to so use the said lands; that certain of the said lands that were improperly included in the first indemnity limits were received erroneously and wrongfully by the said Northern Pacific Railway Company and/or its predecessors in interest; that certain of the said lands erroneously included in the second indemnity limits were received erroneously and wrongfully by the said Northern Pacific Railway Company and/or its predecessors in interest; that certain of the said lands that were erroneously included in the said primary limits, the said first indemnity limits and the said second indemnity limits were used wrongfully by the said Northern Pacific Railway Company or its predecessors in interest for the making of lieu selections under the Acts of June 22, 1874, and July 1, 1898; that certain of the said lands were erroneously used by the said Northern Pacific Railway Company or its predecessors in interest for the making of mineral indemnity selections; that notwithstanding that the Northern Pacific Railway Company and/or its predecessors in interest were not entitled to receive from the United States any of the aforesaid lands as they were received, or at all, the said Northern

Pacific Railway Company and/or its predecessors in interest have been credited with the said lands and did receive portions thereof to the same extent and to the same purpose as if the said companies had been entitled to receive the said lands; that as a consequence of the erroneous fixation of the said land grant limit lines through Montana and Idaho, the said Northern Pacific Railway Company or its predecessors in interest have received from the United States 145,000 acres of the said lands, more or less, which it was not entitled to receive as they were received, or at all, all of which lands have been received by the Northern Pacific Railway Company or its predecessors in
59 interest through patent, or otherwise; that a schedule of said lands as in this paragraph alleged is attached to this bill of complaint and marked Exhibit U; that each and all of the patents that have been issued by the United States to each and all of the said lands, and each and every claim of title to the said lands by the said Northern Pacific Railway Company and/or its predecessors in interest were and are null and void, all of which was at all times known to the said companies; that upon the issuance by the United States of the said patents, or otherwise, the said Northern Pacific Railway Company and/or its predecessors in interest assumed a complete ownership of the said lands, including the right of possession thereof, and including the right to lease and otherwise deal with the said lands and to sell the said lands to third persons; that notwithstanding that the said lands and each and all of them were wrongfully obtained from the United States by the said Northern Pacific Railway Company and/or its predecessors in interest, the said lands have never been reconveyed to the plaintiff herein, but to the contrary, extensive areas of the said lands have been sold to third persons by the said Northern Pacific Railway Company and/or its predecessors in interest, and extensive areas of the said lands have been and now are retained by the said Northern Pacific Railway Company for its own use and benefit, notwithstanding that at all times mentioned herein the said lands and all of them were the property of the United States; that large sums of money have been received by the said Northern Pacific Railway Company and/or its predecessors in interest through sales and leases, and from other revenues from the said lands, all of which moneys rightfully belong to your plaintiff.

XXVI

That under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, the said Northern Pacific Railroad Company was

authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous main line of railroad and telegraph line, with a branch line, the said main line beginning at a point on Lake Superior in the State of Minnesota
60 or Wisconsin, running thence westerly, within the territory of the United States on a line north of the forty-fifth degree of latitude to some point on Puget Sound, by way of the valley of the Columbia River, and the said Northern Pacific Railroad Company was given the right and duty to locate and construct the branch line from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; that subsequent to the passage of the said Joint Resolution of May 31, 1870, the said Northern Pacific Railroad Company on July 30, 1870, filed with the Secretary of the Interior, under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, two separate maps of general route showing the proposed line of the said Northern Pacific Railroad, one of the said maps showing a line extending from the Montreal River, State of Wisconsin, to a point at the mouth of the Walla Walla River in Washington; that under this said map, the said railroad was shown as entering the Territory of Washington in the southeastern corner thereof, and thence proceeding westerly to the mouth of the Walla Walla River; that the second of the said maps shows a proposed railroad line from the mouth of the Walla Walla River, extending down the valley of the Columbia River to a point near Portland, Oregon, and thence northerly to Puget Sound; that subsequent thereto, the said Northern Pacific Railroad Company on February 16, 1872, filed with the Secretary of the Interior an amended map of general route, extending from the Red River in Dakota to the mouth of the Walla Walla River in Washington; that under this said map of general route, the said railroad was shown as entering the Territory of Washington at a point northeast of Spokane Falls, and thence proceeding southwesterly through Spokane Falls to the mouth of the Walla Walla River, where the said general route joined with the general route shown on the said map of July 30, 1870, and which extended from the mouth of the Walla Walla River down the valley of the Columbia River to a point at or near Portland, Oregon, thence
61 northerly to Puget Sound; that upon the filing of the said amended map of general route on February 16, 1872, the portion of the general route in Washington, and extending from the southeast corner thereof to the Walla Walla River, and as shown by the general route map of July 30, 1870, was abandoned.

That upon the filing of the said amended map of general route on February 16, 1872, the general route of the main line

of the said Northern Pacific Railroad through the Territory of Washington extended from the eastern boundary of the said territory, thence southwesterly through Spokane Falls, thence southwesterly to the mouth of the Walla Walla River, thence from the mouth of the Walla Walla River down the Columbia River to a point near Portland, Oregon, thence northerly to Puget Sound; that by and upon the filing with the Secretary of the Interior of the said amended map of general route of February 16, 1872, and by and upon the filing of the said map of general route of July 30, 1870, the said Northern Pacific Railroad Company notified the Secretary of the Interior that it was the intention and purpose of the said Northern Pacific Railroad Company to construct its main line of railroad upon the said general route, or approximately so, as delineated on the said maps and between the eastern boundary of the Territory of Washington, southwesterly through Spokane Falls to the mouth of the Walla Walla River, thence down the valley of the Columbia River to a point at or near Portland, Oregon, and the Secretary of the Interior acting upon such notification to him of such intention and purpose of the said Northern Pacific Railroad Company, as indicated to him by the filing with him of the said maps of general route, made withdrawals of public lands opposite the said line of general route for the said Northern Pacific Railroad Company under the provisions of the Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that not at any time between July 30, 1870, and October 4, 1880, or thereafter did the said Northern Pacific Railroad Company, or the said Northern Pacific Railroad Company as reorganized, apprise the Secretary of the Interior that there would not be constructed under the provisions of the
62 Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, a railroad from the mouth of the Walla Walla River down the valley of the Columbia River to a point at or near Portland, Oregon.

That on October 4, 1880, the said Northern Pacific Railroad Company as reorganized filed with the Secretary of the Interior in the name of the Northern Pacific Railroad Company a map of definite location covering the main line of railroad which it proposed to construct under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and extending between Spokane Falls and the Town of Wallula, Washington, which town was situate at the mouth of the Walla Walla River, and thereafter constructed a railroad connecting Spokane Falls and Wallula, substantially on the line indicated by said map, which said

map was approved by the Secretary of the Interior on October 4, 1880; that the said map of definite location approved October 4, 1880, and showing the road to be constructed between Spokane Falls and Wallula, Washington, followed generally the said map of general route filed February 16, 1872, by the said Northern Pacific Railroad Company, and extending between Spokane Falls and the mouth of the Walla Walla River; that under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, it was the obligation of the said Northern Pacific Railroad Company to construct its main line of railroad to Puget Sound via the valley of the Columbia River, and as a portion of the continuous railroad, which the said Act and the said Joint Resolution contemplated would be constructed; that the said map of definite location of October 4, 1880, and extending between Spokane Falls and Wallula, Washington, was approved by the Secretary of the Interior, upon the assumption induced by the acts and misrepresentations of said Northern Pacific Railroad Company, as reorganized; that thereafter the said Northern Pacific Railroad Company would construct its main line of railroad from Wallula,

Washington, down the valley of the Columbia River to
62 a point near Portland, Oregon, and as required by the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that neither prior to October 4, 1880, nor subsequently thereto, did the said Northern Pacific Railroad Company, or the said Northern Pacific Railroad Company as reorganized, file a map of definite location of a railroad from Wallula, Washington, down the valley of the Columbia River to a point near Portland, Oregon, under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, nor did either of said companies construct any railroad down the valley of the Columbia River between Wallula, Washington, and a point at or near Portland, Oregon, as the Northern Pacific Railroad Company was required to do under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870.

That the western terminus of the main line of the railroad to be constructed under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, was Puget Sound; that Tacoma on Puget Sound was selected by the said Northern Pacific Railroad Company as reorganized, as the western terminus for the said railroad; that by the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, the Northern Pacific Railroad

Company was required to construct its main line of railroad to its western terminus upon the most direct and practicable line without unnecessary deviations; that the railroad constructed in the name of said Northern Pacific Railroad Company from Spokane to Wallula, Washington, substantially following the said map *fo* definite location of October 4, 1880, would have formed a portion of the most direct and practicable line without unnecessary deviations from Spokane to Puget Sound via the valley of the Columbia River, as required by the said Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, had there been a continuation of the said railroad from Wallula, Washington, down the valley of
64 the Columbia River to a point near Portland, Oregon, thence northerly to Puget Sound; that upon the failure of the said Northern Pacific Railroad Company, or the Northern Pacific Railroad Company as reorganized, to construct a railroad down the Columbia River from Wallula, Washington, to a point near Portland, Oregon, as required by the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, the portion of the said railroad that was constructed as aforesaid from Spokane to Wallula, and extending from Lind, Washington, to Wallula, Washington, and following substantially the said map of definite location of October 4, 1880, did not follow and did not constitute, either standing alone or taken in conjunction with the branch line constructed in the name of the Northern Pacific Railroad Company extending from Tacoma, Washington, to Pasco, Washington, and hereinafter referred to, or otherwise, any part of the most direct and practicable line without unnecessary deviations from Spokane, Washington, to Tacoma, the western terminus of the Northern Pacific Railroad Company on Puget Sound.

That the said map of definite location of October 4, 1880, covering the said main line of railroad constructed in the name of the said Northern Pacific Railroad Company from Spokane to Wallula, Washington, was approved by the Secretary of the Interior diverso intuitu; that if on the date of the approval of the said map of definite location of October 4, 1880, the Secretary of the Interior had known that the said Northern Pacific Railroad Company, or the said Northern Pacific Railroad Company as reorganized, would not construct a railroad down the valley of the Columbia River to a point near Portland, Oregon, as required by the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, the Secretary of the Interior would have been without authority in law to approve, and he would not have approved, the said map

of definite location of October 4, 1880; that the said approval of the said map by reason of the failure of the said Northern Pacific Railroad Company to construct its railroad down the valley of the Columbia River to a point near Portland,
65 Oregon, is not now and never has been binding upon the United States.

That subsequent to the construction of the said main line of railroad between Spokane and Wallulu, Washington, in the name of the Northern Pacific Railroad Company, under the said map of definite location of October 4, 1880, there was constructed in the name of the said Northern Pacific Railroad Company by the said Northern Pacific Railroad Company as reorganized, a branch line of railroad from Tacoma, Washington, to Pasco, Washington, where the said branch line joined the aforesaid line of railroad which had been constructed from Spokane to Wallulu, Pasco being twelve miles, more or less, along said line of the said Northern Pacific Railroad north of Wallulu, Washington; that the said branch line was constructed under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and was completed in the year 1888; that ever since the completion of the said branch line from Tacoma, Washington, to Pasco, Washington, the said branch line has been used in fact by the said Northern Pacific Railroad Company as reorganized, or the said Northern Pacific Railway Company, in conjunction with the said line of railroad as constructed under the said map of October 4, 1880, from Spokane to Pasco, as the main line of the said Northern Pacific Railroad from Spokane, Washington, to the western terminus thereof at Tacoma, Washington; that the said line of railroad so used extends through the towns of Spokane, Lind, Pasco, Ellensburg, and Tacoma, and is the one and only line of railroad constructed by the Northern Pacific Railroad Company, or the Northern Pacific Railroad Company as reorganized, or the Northern Pacific Railway Company, under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, connecting the eastern and the western termini of the said Northern Pacific Railroad contemplated by the said Act and the said Resolution; that while the said branch line as constructed from Tacoma to Pasco, has in fact been used in the name of the said Northern Pacific Railroad Company as a portion of its main line across the State of Washington, no portion
66 of the said branch line as constructed between Ellensburg and Pasco, either standing alone or taken in conjunction with the line of the Northern Pacific Railroad extending from Spokane, Washington, to Pasco, Washington, constitutes any

part of a direct and practicable line without unnecessary deviations from Spokane, Washington, to the western terminus of the Northern Pacific Railroad on Puget Sound; that the said line of the said Northern Pacific Railroad across the State of Washington, which is comprised of the said line constructed in the name of the Northern Pacific Railroad Company from Spokane to Pasco, Washington, and the said branch line constructed in the name of the said Northern Pacific Railroad Company from Pasco, Washington, to Tacoma, Washington, is a circuitous route between Spokane and Tacoma, Washington, in that it contains unnecessary deviations and does not follow a direct and practicable line between Spokane and Tacoma, but to the contrary, the said railroad line, as so constituted, follows and is constructed over a route that is approximately eighty-two miles longer than a direct and practicable line between Spokane and Tacoma.

That at all times prior to September 29, 1890, the said Northern Pacific Railroad Company as created by the Act of July 2, 1864, or as reorganized under the plan of reorganization of June 30, 1875, was empowered under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, subject to the dominant rights of the United States, to construct its said main line from Wallulu, Washington, down the valley of the Columbia River to a point at or near Portland, Oregon, and by so constructing the said main line down the valley of the Columbia River to a place near Portland, Oregon, to earn the grant of lands provided in the said grant of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870.

That prior to the construction of the said branch line of railroad from Tacoma to Pasco, there were filed with the Secretary of the Interior in the name of the Northern Pacific Railroad Company by the Northern Pacific Railroad Company as
67 reorganized, certain maps of definite location covering the line of said railroad, which maps were approved by the Secretary of the Interior; that opposite the said branch line railroad as located by the said maps and opposite the said map of definite location of October 4, 1880, covering the said line of railroad between Spokane and Wallulu, land grant limits were established by the Secretary of the Interior under the provisions of said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and from the said limits so established there were patented by the United States in the name of the Northern Pacific Railroad Company and in the name of the Northern Pacific Railway Company, through error and through mistake, certain tracts of lands which the said

Northern Pacific Railroad Company, or the said Northern Pacific Railroad Company as reorganized, or the said Northern Pacific Railway Company, did not and could not earn, and was not entitled to receive from the United States.

That upon the failure of the said Northern Pacific Railroad Company, or the said Northern Pacific Railroad Company as reorganized to construct a main line of railroad down the valley of the Columbia River to a point near Portland, Oregon, as aforesaid, the maximum primary land grant acreage the said Northern Pacific Railroad Company, or the said Northern Pacific Railroad Company as reorganized, or the said Northern Pacific Railway Company, was entitled to be credited with or to receive from the United States by reason of the construction of the said railroad lines across the State of Washington, from Spokane to Tacoma, was the quantum of acreage that would fall within land grant limits fixed opposite a direct and practicable line between Spokane and Tacoma, and not the primary land grant acreage contained in the land grant limits established as aforesaid opposite the said line as constructed from Spokane to Wallula and said branch line constructed from Pasco to Tacoma; that a route for such a direct and practicable line between Spokane and Tacoma was open and available to the said Northern Pacific Railroad Company at all times during
68 the course of construction of the said line of railroad from Spokane to Wallula, and the said branch line from Pasco to Tacoma, and for many years thereafter, and was the route over which the said Northern Pacific railroad was constructed from Spokane to Lind, Washington, thence proceeding westerly from Lind over the railroad route over which was constructed the main line of the Chicago, Milwaukee, St. Paul & Pacific Railroad to Ellensburg, Washington, thence proceeding westerly from Ellensburg, Washington, along the said Northern Pacific branch line from Ellensburg to Tacoma, Washington; that within the primary land grant limits fixed opposite such a route of railroad across the State of Washington, under the terms of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, there would be and are approximately 1,400,000 acres less than were included in the land grant limits fixed opposite the said Northern Pacific railroad as constructed between Spokane and Wallula, and the said Northern Pacific branch line railroad as constructed between Pasco and Tacoma.

That heretofore and prior to March 25, 1925, the Department of the Interior in computing the measure of the land grant under the Act of July 2, 1864, as modified and supplemented by the

Joint Resolution of May 31, 1870, and the portion thereof between Spokane, Washington, and Tacoma, Washington, has based its computations upon the odd-numbered sections within the primary limits laid down as aforesaid, opposite the said line of railroad constructed between Spokane and Wallula, and between Pasco and Tacoma, and the said computations through error and mistake have been carried into and reflected in the total of all of the acreages entitled to be earned under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, with the consequence that in the said total acreages covering the entire land grant, the said Northern Pacific Railway Company has been credited by the Department of the Interior through error and mistake with approximately 1,400,000 acres, to which it was not entitled to be credited by the United States, over and above the maxi-
69 mum acreage the said Northern Pacific Railway Company and/or its predecessors in interest were entitled to be credited for the construction of the said railroad line across the State of Washington, under the facts and circumstances peculiar thereto and as aforesaid; that as a consequence of such error and mistake, the said Northern Pacific Railway Company and/or its predecessors in interest, the said Northern Pacific Railroad Company, and the said Northern Pacific Railroad Company as reorganized, have received the said 1,400,000 acres, more or less, within the primary limits of the said land grants, established as aforesaid, by patent and otherwise, and where the said lands were not available in the said primary limits, the said Northern Pacific Railway Company and/or its said predecessors in interest have received, by patents, certain lands within the indemnity limits, and in addition thereto have received, by patents, certain lieu selections; that the said lands and all of them so received were lands of the United States which the said Northern Pacific Railway Company and/or its said predecessors in interest were without right to receive from the United States; that a schedule of the said lands as in this paragraph alleged is attached to this bill of complaint and marked Exhibit V; that upon the issuance by the United States of the said patents, or otherwise, the said Northern Pacific Railway Company and its said predecessors in interest assumed a complete ownership of the said primary, indemnity and lieu lands including the right of possession thereof and including the right to lease and otherwise deal with the said lands and to sell the lands to third persons; that not withstanding that the said lands and each and all of them were wrongfully obtained from the United States by the said Northern Pacific Railway Company and/or its said predecessors in interest,

said lands have never been reconveyed to the plaintiff herein, but to the contrary, extensive areas of the said lands have been sold to third persons by the said Northern Pacific Railway Company and/or its said predecessors in interest, and extensive areas of the said lands have been and now are retained by the said
70 Northern Pacific Railway Company for its own use and benefit, and notwithstanding that at all times mentioned herein the said lands and all of them were the property of the United States; that large sums of money have been received by the said Northern Pacific Railway Company and/or its predecessors in interest through sales and leases and from other revenues from the said lands, all of which moneys rightfully belong to your plaintiff.

XXVII

That the primary limits of the main line railroad as established by the said map of general route of July 30, 1870 above described and the primary limits of the land grant for the branch line from Tacoma, Washington, across the Cascade Mountains to Pasco, overlap at or near Pasco; that in the administration of the said grants, a moiety of said lands within said overlapping area was credited to the branch line construction, and the remaining moiety of said lands within the said overlapping area, and which would have been earned by the proper construction of the said main line of railroad, was never earned thereby inasmuch as the said main line of railroad was not constructed by the said Northern Pacific Railroad Company, or the said Northern Pacific Railway Company, from the mouth of the Walla Walla River down the valley of the Columbia River to a point at or near Portland; that the said main line moiety lands were by the Act of September 29, 1890 (26 Stat. 496) declared forfeited by the United States because of the failure of the said grantee to construct the main line of said road via the valley of the Columbia River to Portland; that Section 6 of the said Act of September 29, 1890, in declaring the forfeiture of lands opposite unconstructed railroads provided:

"Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared, to the benefit of the completed line."

That thereafter by the Act of Congress of May 17, 1906 (34 Stat. 197), the relief provisions of the Act of July 1, 1898
71 (30 Stat. 597) were extended to include bona fide settlements or entries made subsequent to January 1, 1898 and

prior to May 31, 1905, on lands included within the moiety of said overlapping area which had been withdrawn for the benefit of the proposed construction of the main line road from Wallula, Washington, to Portland, Oregon; that lands having a total area of 476,990.08 acres, more or less, part of which was situated within the moiety so withdrawn in favor of the said proposed main line construction, and part of which lands was selected in lieu of losses alleged to have occurred within said moiety, were patented to or otherwise conveyed to the said Northern Pacific Railway Company; that a schedule of said lands by numerical description is attached hereto, marked Exhibit W, and made a part hereof; that the said Act of May 17, 1906 was passed as a result of a misconstruction of the law by the administrative officers of the Government and by Congress relative to the rights of said Northern Pacific Railway Company and/or its predecessors in interest to lands embraced in said moiety, which had been forfeited to the United States as above alleged; that said lands had not and never have been earned by said Northern Pacific Railway Company and/or its predecessors in interest, and the conveyance of said lands was and is wholly without consideration and void; that each and all of the patents that have been issued by the United States to each and all of the said lands, and each and every claim of title to the said lands by the said Northern Pacific Railway Company and/or its predecessors in interest were and are null and void, all of which was at all times known to the said companies; that upon the issuance by the United States of the said patents, or otherwise, the said Northern Pacific Railway Company assumed a complete ownership of the said lands, including the right of possession thereof, and including the right to lease and otherwise deal with said lands, and to sell the lands to third persons; that notwithstanding that the lands and each and all of them were wrongfully obtained from the United States by the said Northern Pacific Railway Company,

72 the said lands have never been reconveyed to the plaintiff herein, but to the contrary, extensive areas of the said lands have been sold to third persons by the said Northern Pacific Railway Company, and extensive areas of the said lands have been retained by the said Northern Pacific Railway Company for its own use and benefit, notwithstanding that at all times mentioned herein the said lands and all of them were the property of the United States; that large sums of money have been received by the said Northern Pacific Railway Company and/or its predecessors in interest through sales and leases and from other revenues from the said lands, all of which moneys rightfully belong to your plaintiff.

XXVIII

That under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, mineral lands other than coal and iron were excepted from the limits of the land grant made thereby, and for mineral lands so excepted from the primary limits thereof, the said Northern Pacific Railroad Company was authorized to make mineral indemnity selections in lieu thereof for a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest the line of said road and within fifty miles thereof; that subsequent to the decision dated May 26, 1894 by the Supreme Court of the United States in Barden v. Northern Pacific Railroad Company, 154 U. S. 288, Congress passed the Act of February 26, 1895 (28 Stat. 683), providing for the examination and classification, under such rules and regulations as the Secretary of the Interior should prescribe, of the lands within the primary and the indemnity limits of the said Northern Pacific land grant, with special reference to the mineral and nonmineral character of such lands situate within the Couer d'Alene, Idaho, and the Bozeman, Helena and Missoula land districts in Montana; that the said Act authorized the appointment of a commission composed of three members for each of the said land districts; that the said Act provided that the said Commissioners should make reports covering the lands examined and classified by them, and that the classifications when approved by the Secretary of the Interior should be considered final, except in case of fraud; that the said Act likewise provided that no patent or other evidence of title should be issued or delivered to the said Northern Pacific Railroad Company for any land in said land districts until such land shall have been examined and classified as nonmineral as provided thereby, and such patent or other evidence of title shall only issue then to such land, if any, in said land districts as the said Northern Pacific Railroad Company may be, by law and compliance therewith and by the said classification, entitled to, and any patent, certificate, or record of selection, or other evidence of title or right to possession of any land in said land districts, issued, entered or delivered to the said Northern Pacific Railroad Company in violation of the provisions of the said Act shall be void; that it was required by the said Act of February 26, 1895, that the said Commissioners appointed thereunder should determine as a present fact, after personal examination of the said lands, whether the said lands were or were not mineral lands within the meaning of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870,

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and upon such determination to classify the said lands as mineral or nonmineral, as the case might be, and to report their classifications to the Secretary of the Interior through the local land offices for his action under the provisions of the said Act of February 26, 1895; that under the said Act of February 26, 1895, the Secretary of the Interior did promulgate rules and regulations (20 L. D. 390) for the classification of the said lands by the said Commissions and prescribed therein that where the said lands to be classified were surveyed, the said Commissioners should make an examination in the field of each forty-acre subdivision, and that upon the completion of the classification of said surveyed lands, the said Commissioners therafter should as rapidly as practicable examine and classify in the same manner all unsurveyed lands in their respective districts; that the said rules and regulations of the Secretary of the Interior
74 contemplated and required that the said Commissioners should be personally present upon the said lands while making their said examinations.

That the said Commissioners so appointed undertook the classification of approximately 11,500,000 acres of land located in the said land districts, and did pretend to classify the same; that reports covering the said pretended classifications were filed by the said Commissioners in the local land offices, and were transmitted to the Secretary of the Interior, and with certain minor exceptions were approved by him; that of the lands so pretended to be classified by the said Commissioners, 3,782,377.90 acres, more or less, were classified as mineral lands, and the said pretended classifications were approved by the Secretary of the Interior; that for and in lieu of the said lands so classified as mineral lands under the said pretended classifications which were approved by the Secretary of the Interior as aforesaid, the said Northern Pacific Railway Company and/or its predecessors in interest have made under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, mineral lieu selections totalling 1,330,762.65 acres, more or less, and the said mineral lieu selections have been approved and patents have been issued therefor by the United States to the said Northern Pacific Railway Company and/or its predecessors in interest; that the defendant, Northern Pacific Railway Company, now claims the right to have patented to it by the United States, additional indemnity lands to the amount of 2,451,615.25 acres, more or less, in lieu of a similar acreage of the said lands that were classified as mineral under the said classifications to the extent that there are within fifty miles of the line of the Northern Pacific railroad as constructed under the

said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, lands available to satisfy such pretended mineral indemnity selection rights.

That a schedule of the lands pretended to be classified as mineral by the said Commissioners as herein alleged is marked
75 Exhibit X and attached to this bill of complaint and made a part hereof; that a schedule of the said mineral indemnity selection lands which have been selected by and patented to the said Northern Pacific Railway Company and/or its predecessors in interest to satisfy losses of lands so classified as mineral is marked Exhibit Y and attached to this bill of complaint and made a part hereof.

That the said Northern Pacific Railway Company and/or its predecessors in interest have received by and from the said 1,330,762.65 acres of mineral indemnity lands so selected a total value equal to or in excess of the total value of all of the 3,782,-377.90 acres of lands that were classified as mineral by the said Commissioners, as aforesaid.

That the said reports made by the said Commissioners to the land offices of the plaintiff relative to the examinations made by them of the lands so classified as mineral or nonmineral, which reports were approved by the Secretary of the Interior upon the representations and statements made therein, were false and untrue in that the said reports conveyed to the Secretary of the Interior, in error and in fraud and in deceit, the representations and statements of the said Commissioners that they had been upon and had made personal examinations of the said lands which they had classified as mineral or nonmineral under the provisions of, and as required by, the Act of February 26, 1895, and said rules and regulations of the Secretary of the Interior thereunder, when in truth and in fact the said Commissioners had not been upon and had not made such examinations of said lands; that large areas of the said lands were reported by the said Commissioners to the Secretary of the Interior as having been personally examined when on the dates of the said purported examinations said lands were covered with snow, and, by reason thereof, could not be personally examined by said Commissioners for the purpose of determining whether said lands were mineral or nonmineral in character, and in that the said reports of the said Commissioners show tracts of land as having
been classified, which, because of the great size thereof,
76 could not be personally examined by the said Commissioners within the time limits which the said Commissioners represented in their said reports said lands had been personally examined, and in that while the said reports show

that the said classifications were made with special reference to the mineral or nonmineral character of the said lands, as required by the said Act of February 26, 1895, the said classifications were not made with special reference to the mineral or nonmineral character of the said lands, but they were made with special reference to the values of the said lands, that is to say, that where the said lands that were being classified, and were classified, were of high value, they were classified as nonmineral without reference to their mineral character, and thereafter, and as a consequence of such classifications, subject to minor exceptions, the said lands were patented to the said Northern Pacific Railway Company and/or its predecessors in interest, while such of the said lands that were being classified, and were classified, were considered of low value, or were not considered suitable for any agricultural purpose, the said lands were given a mineral classification by the said Commissioners without reference to whether or not the said lands were in fact mineral lands, with the result that as a consequence of the said pretended classifications of the said 3,782,317.90 acres of lands as mineral, the said lands were upon the approval of the said classifications by the Secretary of the Interior excepted from the said land grant, and for the said lands so excepted, the said Northern Pacific Railway Company and/or its predecessors in interest received mineral indemnity selection rights for a like acreage, which said mineral indemnity selection rights have been exercised by the said Northern Pacific Railway Company and/or its predecessors in interest to the extent of 1,330,762.65 acres as aforesaid, all in violation of the provisions of the said Act of February 26, 1895, and the said rules and regulations of the Secretary thereunder, and of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and to the injury of the United States; that the said Northern Pacific Rail-
77 way Company and/or its predecessors in interest well knew that the said classification reports made as aforesaid by the said Commissioners were fraudulent, deceitful, false and untrue, in that prior to and during the course of the preparation of the said classification reports, the agents and employees of the said Northern Pacific Railway Company and/or its predecessors in interest were present in the field and elsewhere with the said Commissioners, were familiar with their activities, and conferred with the Commissioners as to whether the said lands should be classified as mineral or nonmineral, and in such conferences suggested, recommended to and importuned the said Commissioners to classify the said lands as mineral or nonmineral upon the basis of values and otherwise without

special reference to the mineral or nonmineral character of the said lands, as the said agents and employees of the said Northern Pacific Railway Company and/or its predecessors in interest desired to have the said lands classified, and the said Commissioners in many instances acceded thereto and did generally classify the lands as mineral or nonmineral in accordance with the wishes of the said agents and employees of the said Northern Pacific Railway Company and/or its predecessors in interest, without special reference to the mineral or nonmineral character of the said lands, and without having made such an examination or any examination of the said lands as would enable the said Commissioners properly to determine the character of said lands and properly to classify the said lands as mineral or nonmineral as required by the said Act of February 26, 1895; that the said agents and employees of the said Northern Pacific Railway Company and/or its predecessors in interest were at all times fully advised and knew prior to the approval of the said classifications by the Secretary of the Interior that the said classifications as made by the said Commissioners were not made with special reference to the mineral or nonmineral character of the said lands as required by the said Act of February 26, 1895, and that the said classifications were not made following such personal examinations of the said lands as would enable the said Commissioners to determine the character of said
78 lands and properly to classify the said lands as mineral or nonmineral, as required by the Act of February 26, 1895, and said rules and regulations of the Secretary of the Interior, as the said classification reports of the said Commissioners represented and stated the said lands had been classified, yet the said agents and employees of the said Northern Pacific Railway Company and/or its predecessors in interest, well knowing the falsity of the said reports as aforesaid, and well knowing that the Secretary of the Interior would in the ordinary course of business act upon the said classification reports of the said Commissioners and would approve the said classifications made thereby, unless the said Northern Pacific Railway Company and/or its predecessors in interest should inform him of the falsity of the said reports, and well knowing that the said Northern Pacific Railway Company and/or its predecessors in interest would become the beneficiaries under such classifications upon the approval thereof by the Secretary of the Interior, and would thereby wrongfully be permitted to receive and would receive lands and values to which they were not entitled, failed to speak as it was their duty to speak and to advise the Secretary of the Interior of the truth in the premises, to the advantage of the

said Northern Pacific Railway Company and/or its predecessors in interest, and to the injury of the United States.

That from March 1895 until April 1897, A. A. Crane served as a member of the Commission appointed under the said Act of February 26, 1895, for the classification of the said Northern Pacific land grants in the State of Idaho; that from May 1895, until April 1897, John B. Goode served as a member of the Commission appointed under the said Act of February 26, 1895, for the classification of the said Northern Pacific land grants in the state of Idaho; that during the year 1896, and while the said Goode and the said Crane were serving as members of the said Commission, the said Northern Pacific Railway Company entered into certain executory contracts with the said Goode and the said Crane under the firm name of Crane and Goode, under
79 which contracts said Crane and Goode engaged in the cutting and removing of certain timber from certain of the lands of the said Northern Pacific Railway Company, which contracts upon being entered into were outstanding at all times thereafter during the period that the said Crane and Goode served as members of the said Commission; that the contractual relationship thereby brought about created a conflict in the personal interests of the said Crane and Goode with their duties as Commissioners, and that the said Northern Pacific Railway Company by entering into the said contracts with the said Crane and Goode thereby deprived the United States of the services of the said Crane and Goode as free agents of the mineral Commission in the classifications of the said lands, in defeat of the public policy of the United States pertaining to the disposition of the public domain, and in violation of the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that similar contracts were made by others of said Commissioners while serving as such Commissioners, with the same or similar result.

That at all times during the making of the said pretended classifications, the said Commissioners, and all of them, were the recipients of free transportation and other benefits and favors from the said Northern Pacific Railway Company, and were not free agents of the United States, but, on the contrary, were under obligations to the said Northern Pacific Railway Company, defendant herein; that by reason of the matters and things set forth in this paragraph, said Northern Pacific Railway Company and/or its predecessors in interest are not entitled to any additional lands or moneys from the United States by reason of the classification made under the Act of February 26, 1895.

XXIX

That under and by virtue of the provisions of a treaty dated September 17, 1851 (11 Stat. 749), by and between the United States and certain tribes of Indians named therein, certain lands of the United States were set apart and reserved by the United States on September 17, 1851, as reservations for the Sioux
80 or Dahcotah, Cheyenne, Arrapaho, Crow, Assinaboin, Gros Ventre, Mandan, and Arraickara Tribes of Indians, the said lands being all of the lands embraced within each of the respective tracts set apart for each of the said tribes of Indians, as more particularly described in said treaty of September 17, 1851: that the said treaty as first signed on September 17, 1851, by the said tribes of Indians, provided among other things that the United States would deliver to the said Indian Nations the sum of $50,000 per annum for the term of fifty years; that thereafter the said treaty was considered by the Senate of the United States, and the said term for which the said payments should run was reduced from fifty years to ten years with a proviso that the President of the United States might in his discretion extend the period for an additional five years; that the said treaty as amended was returned to the said Indians for confirmation, and was duly signed and ratified by each and all of the said Indian tribes; that by various appropriation acts passed from year to year from 1852 to 1865, inclusive, Congress appropriated in all approximtely $1,050,439.13, which moneys were paid to the said Indian tribes under and by virtue of the provisions of the said treaty of September 17, 1851.

That in the said treaty of September 17, 1851, certain public lands were set apart for the Blackfoot Nation of Indians, but the said Blackfoot Nation did not sign the said treaty as originally drawn or as modified; that under date of October 17, 1855, a treaty was entered into between the United States and the said Blackfoot Nation of Indians, under which the said area described in said treaty of September 17, 1851, for the said Blackfoot Nation was set apart as a reservation for the said Blackfoot Indians, with certain portions of the said area reserved as hunting grounds for certain other Indians who were parties to the said treaty.

That all of the lands embraced within the respective boundaries of the said reservations, as set apart and created for the said bands of Indians by the said treaty of September 17, 1851, and the said treaty of October 17, 1855, continued to be
81 so set apart and reserved for the said tribes of Indians at all times thereafter up to and including July 2, 1864,

the date of the grant of public lands to the Northern Pacific railroad (13 Stat. 365).

That by a treaty dated May 7, 1868, between the United States and the Crow Tribe of Indians, the reservation created for the said Crow Tribe of Indians under and by virtue of the said treaty of September 17, 1851, was reduced in size, and the said lands that had been set apart and reserved for the said Crow Tribe of Indians under the said treaty of September 17, 1851, exclusive of the said lands that were set apart and reserved for them under and by virtue of the said treaty of May 7, 1868, were restored to the public domain.

That under the provisions of the Act of July 2, 1864, a grant of lands was made to the said Northern Pacific Railroad Company in language as set out in Paragraph III above, with indemnity for losses of certain of said lands, and by said Joint Resolution of May 31, 1870, the language of which is set out in said Paragraph III, a second indemnity limit was created for the satisfaction of certain losses occurring subsequent to July 2, 1864.

That the said Act of July 2, 1864, was a grant in praesenti; that lands within the primary limits thereof, which on July 2, 1864, were reserved lands or were lands that were not public lands of the United States, were excepted from the operation of the said grant; that for such lands the said Northern Pacific Railroad Company was entitled to make indemnity selections therefor in the first indemnity limits of the said grant to the extent that there were public lands available; that the said Northern Pacific Railroad Company was not entitled to make indemnity selections in the second indemnity limits of the said land grant for losses sustained in the primary limits of the said land grant prior to July 2, 1864, inasmuch as the second indemnity limits of the said land grant were available only for indemnity selection in satisfaction of losses occurring in the primary limits of the said land grant between July 2, 1864, and the date or dates of
82 the definite location of the said Northern Pacific railroad.

That during the years 1880, 1881, and 1882, there were filed with the Interior Department in the name of the Northern Pacific Railroad Company by the said Northern Pacific Railroad Company as reorganized several maps of definite location covering the portions of the railroad proposed to be constructed from Bismarck, North Dakota, to Lake Pend O'Reille, Idaho, under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, said maps being filed on different dates and constituting one continuous line of definite location; that substantially upon the line of definite location as shown by the said maps, there was constructed in

the name of the said Northern Pacific Railroad Company by the Northern Pacific Railroad Company as reorganized a portion of the railroad contemplated by the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, that opposite the said line of definite location as shown by the said maps, primary and indemnity limits were established by the Secretary of the Interior, and the lands embraced therein were withdrawn for the use and benefit of the said Northern Pacific Railroad Company; that the said line of definite location and the said constructed railroad of the said Northern Pacific Railroad Company extending from Bismarck, North Dakota, to Lake Pend O'Reille, Idaho, entered upon and crossed over certain of the lands that had been reserved as aforesaid for the various Indian tribes under the provisions of the treaties of September 17, 1851, and October 17, 1855; that the said withdrawals for the said Northern Pacific Railroad Company opposite said maps of definite location embraced and contained large areas of the said lands that had been reserved for said Indian tribes as aforesaid; that notwithstanding that large areas of the said lands embraced within the said railroad withdrawals were parts and parcels of the said Indian reservations and by reason thereof were lands that were not within the operation of the said grant of lands to the said Northern Pacific Railroad
83 Company under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, but were lands that were excepted therefrom, the officers of your plaintiff, through error and mistake, and without authority so to do, administered the said land grant upon the theory that the said lands that had been so set apart and reserved by the United States for said Indian tribes were not lands that had been reserved for the said Indians, but were lands that were subject to acquisition by the said Northern Pacific Railroad Company under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that each and all of the said lands within the limits of the said Indian reservations were excepted from the primary limits of the said land grant as established by the Secretary of the Interior under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and for the said lands so excepted the said Northern Pacific Railroad Company was entitled to make indemnity selections in the first indemnity limits of the said grant in satisfaction of the said losses incurred in the primary limits of the said land grant to the extent that there were within the first indemnity limits of the said land grant lands available to satisfy the said losses; that as a consequence

of the error and mistake of the officers of the plaintiff, the said Northern Pacific Railway Company and/or its predecessors in interest have received from the United States 12,000,000 acres, more or less, in the primary and first indemnity limits of the said land grant over and above what the said Northern Pacific Railway Company and/or its predecessors in interest were rightfully entitled to receive from the United States under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that in addition thereto the said Northern Pacific Railway Company and/or its predecessors in interest have received in error and through mistake in the second indemnity limits of the said land grant approximately 1,300,000 acres of lands of the United
84 States which the said Northern Pacific Railway Company and/or its predecessors in interest were not entitled to receive from the United States under the provisions of said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that as a result of the said error and mistake, the officers of your plaintiff have issued patents to the said Northern Pacific Railway Company and/or its predecesssors in interest to the aforesaid 12,000,000 acres of land and the aforesaid 1,300,000 acres of land; that each and all of the said patents so issued by the United States to each and all of the said lands and each and every claim of title to the said lands by the said Northern Pacific Railway Company and/or its predecessors in interest were and are null and void, all of which was at all times known or should have been known to said companies; that a schedule of the said lands as in this paragraph alleged is attached to this bill of complaint, marked Exhibits Z and AA; that upon the issuance by the United States of the said patents or otherwise, the said Northern Pacific Railway Company and/or its predecessors in interest assumed a complete ownership of the said lands and all of them, including the right of possession thereof, and including the right to lease and otherwise deal with the said lands and to sell the said lands to third persons; that notwithstanding that the said lands and each and all of them were wrongfully obtained from the United States by the said Northern Pacific Railway Company and/or its predecessors in interest, the said lands have never been reconveyed to the plaintiff herein, but to the contrary, extensive areas of the said lands have been sold to third persons by the said Northern Pacific Railway Company and/or its predecessors in interest, and extensive areas of the said lands have been retained by the said Northern Pacific Railway Company for its own use and benefit, notwithstanding that at all times mentioned herein the said lands and all of them were the property of the United States; that large sums of money

have been received by the said Northern Pacific Railway Company and/or its predecessors in interest through sales and leases and from other revenues from the said lands, all of which moneys rightfully belong to your plaintiff.

85

XXX

That heretofore the Interior Department, through error and mistake, has computed the lands and all of them erroneously received as alleged in Paragraphs XXII, XXIII, XXIV, XXV, XXVII, and XXIX of this bill of complaint, as portions respectively of the primary and indemnity lands that the said Northern Pacific Railway Company and/or its predecessors in interest were entitled to receive from the United States under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and otherwise; that the United States is entitled to relief from and redress for the fraud, errors, or mistakes as set forth in said paragraphs and in Paragraphs XXVI and XXVIII of this bill to the end that the respective rights and obligations of the United States and the Northern Pacific Railway Company, under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, may be, by an adjustment, accounting, and otherwise ascertained, made certain, and adjudicated as by this bill contemplated.

XXXI

That the grant of public lands made by said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, was to aid in the construction of a telegraph line as well as a railroad line, which telegraph line was to be constructed and maintained by the Northern Pacific Railroad Company along the entire line of said railroad and was required to be constructed, owned, operated, and maintained by the said grantee through its own officers, agents, and servants, and that the management, control, and operation of said telegraph line should at all times be subject to the terms and requirements of said granting Act; that the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, contemplated and provided that the said grant of lands contained therein should inure to the benefit of the said grantee only upon the construction and operation of the said railroad and telegraph line contemplated thereby, without any right whatsoever in the grantee to earn the said grant of lands

86 or any part thereof in the absence of the construction, maintenance, operation, and control of the said telegraph line by the said grantee; that notwithstanding the obligation of

said Northern Pacific Railroad Company to construct, furnish, and maintain said telegraph line, and wholly disregarding its said obligations to the United States in respect thereto, and without constructing, maintaining, furnishing, and controlling a telegraph line as provided by the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, the said Northern Pacific Railroad Company entered into a contract in writing dated April 23, 1870, which contract remained in full force and effect until May 1, 1880, with the North Western Telegraph Company and the Western Union Telegraph Company, therein designated as the telegraph companies; that under the terms of said contract a telegraph line was constructd from Thompson Junction, Minnesota, to Bismarck, North Dakota, and from Kalama, Washington, to Tacoma, Washington, opposite and adjacent to the railroad of the Northern Pacific Railroad Company as a part of the general telegraph system of the said telegraph companies and subject to control and regulation by said telegraph companies at tariffs for all messages, except the messages relating to the said Northern Pacific Railroad Company's business, to be charged for at prices to be fixed by said telegraph companies; that the said contract further provided that the management of the wires used in said telegraph line should be under the supervision of a superintendent subordinate to and under the control of the superintendent of the said telegraph companies, and subject to the rules and regulations established by said telegraph companies; that a copy of said contract is marked Exhibit BB, attached hereto and made a part hereof; that the said Northern Pacific Railroad Company attempted by means of said contract to relieve itself from the duty of constructing, controlling, maintaining, and operating for Governmental, commercial, and other purposes, the telegraph lines contemplated by the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870,
87 and thereby failed and refused to perform the obligations assumed by it in said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that the said telegraph companies took possession and assumed control of said telegraph line for all purposes except railroad business, and continued for many years to so operate said lines; that said contract between the said Northern Pacific Railroad Company and the said Telegraph companies was entered into without authority of law and without the consent of the United States.

That the failure of the said Northern Pacific Railroad Company to construct, furnish, maintain, and control said telegraph

line constituted a branch of the terms, conditions, and covenants of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that notwithstanding such failure and such breach, the said Northern Pacific Railway Company and/or its predecessors in interest have received from the plaintiff by patent or otherwise, and through inadvertence, error, and mistake, large areas of land by reason of the construction of said railroad line from Thompson Junction, Minnesota, to Bismarck, North Dakota, and from Kalama, Washington, to Tacoma, Washington, without constructing a telegraph line opposite said railroad as required by the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870.

XXXII

That under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, there were filed in the name of the said Northern Pacific Railroad Company with the Secretary of the Interior certain general route maps indicating the general route over which the Northern Pacific railroad would be constructed, and that by reason of the said maps the Secretary of the Interior made withdrawals of the odd-numbered sections of public lands for the benefit of the said Northern Pacific Railroad Company; that thereafter maps of definite location were filed in the name of the Northern Pacific Railroad Company with the Secretary of the Interior, and in connection therewith withdrawals of the odd-numbered
88 sections of public lands were made for the use and benefit of the said Northern Pacific Railroad Company; that upon the making of the said withdrawals on general route, the said lands embraced therein were withheld from acquisition under the general land laws and held in such withdrawn status until covered by the said withdrawals on definite location; that the said withdrawals on general route were held to be invalid as against settlers in the case of Nelson v. Northern Pacific Railway Company, 188 U. S. 109, which decision was handed down January 26, 1903, but not until it was too late to cure the ill effects of the said withdrawals on general route, inasmuch as the said decision was subsequent in time to the filing of the maps of definite location in the name of the said Northern Pacific Railroad Company and the withdrawals by the Secretary of the Interior made thereon, which said withdrawals on definite location covered many thousands of the identical acres that had been withdrawn upon the filing of the said maps of general route,

which said acres while withdrawn under the said general route withdrawals for the use and benefit of the said Northern Pacific Railroad Company should have been open to acquisition by third persons under the public land laws; that as a consequence of said withdrawals on general route, the said Northern Pacific Railway Company and/or its predecessors in interest received benefits, lands, and values they were not entitled to receive under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, to the injury of the United States.

That prior to the construction of the said Northern Pacific railroad, there were filed with the Secretary of the Interior in the name of the Northern Pacific Railroad Company under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, certain maps of definite location, and thereupon the Secretary of the Interior laid down the primary and indemnity limits of the grant and withdrew from acquisition by third persons under the public land laws the odd-numbered sections situate in the indemnity limits of the grant for the use and benefit of
89 the said Northern Pacific Railroad Company; that such indemnity withdrawals were held to be invalid against the operation of preemption and homestead laws by the Supreme Court of the United States in the case of Hewitt v. Schultz, 180 U. S. 139, decided by the Supreme Court on January 7, 1901; that under and by virtue of such withdrawals of the said indemnity lands, the said Northern Pacific Railway Company and/or its predecessors in interest received benefits, lands, and values that they were not entitled to receive under and by virtue of the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, to the injury of the United States.

XXXIII

That under and by virtue of the provisions of the Act of July 15, 1870 (16 Stat. 305), the said Northern Pacific Railroad Company was required to reimburse the United States for the costs of making the surveys of the lands embraced in the land grant made under the Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and in said Act it was provided:

"That before any land granted to said (Northern Pacific Railroad) company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or

relating to said company, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same, by the said company or party in interest." That within the limits of the said land grant as laid down by the Secretary of the Interior opposite maps of definite location filed in the name of the said Northern Pacific Railroad Company by the said Northern Pacific Railroad Company and by the said Northern Pacific Railroad Company as reorganized and opposite the line of railroad constructed in connection therewith, there were many hundreds of thousands of acres of the said granted lands which prior to December 7, 1885, were claimed by the said Northern Pacific Railroad Company and by the said Northern Pacific Railroad Company as reorganized, and which prior to said date had been surveyed by the United States, and for which surveys the United States was entitled to receive from said
90 companies the costs incurred by it in the making of said surveys; that prior to the decision of the Supreme Court of the United States in the case of Northern Pacific Railroad Company v. Traill County, 115 U. S. 600, decided on December 7, 1885, the said Northern Pacific Railroad Company or the said Northern Pacific Railroad Company as reorganized failed to pay and refused to pay the United States the costs that had been incurred by the United States in surveying the said acreages of the said granted lands, to the injury of the United States.

XXXIV

That subsequent to the filing of the aforesaid maps of definite location and the fixation by the Secretary of the Interior of the primary and the indemnity limits of the said land grant as made in the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, there were within the indemnity limits of the said grant approximately 450,000 acres of lands of odd-numbered sections which were available to the said Northern Pacific Railway Company and/or its predecessors in interest in satisfaction of losses in the primary limits of the grant but which said lands in the said indemnity limits of the grant, the said Northern Pacific Railway Company and/or its predecessors in interest through laches and otherwise failed to select as indemnity lands notwithstanding that the said indemnity lands were available to the said Northern Pacific Railway Company and/or its predecessors in interest as indemnity lands for selection in satisfaction of losses in the primary limits of the said land grants; that by reason of the laches of the said Northern Pacific Railway Company and/or its prede-

cessors in interest in the selection of said lands and the failure of said companies to select said lands while they were available, said lands were lost to said companies through the acquisition of them by third persons under the public land laws of the United States.

XXXV

That under the provisions of the Act of March 2, 1899 (30 Stat. 993), Congress, acting upon erroneous information which
91 had been presented to it, enabled the said Northern Pacific Railway Company and/or its predecessors in interest to relinquish to the United States thousands of acres of lands of low value, and select in lieu thereof from the public lands of the United States a comparable acreage of lands of much higher value, to the injury of the United States.

XXXVI

That prior to the decision of the Supreme Court of the United States in 256 U. S. 51, it was the position of the Department of the Interior that in the absence of a deficiency, ascertained and approved by the Secretary of the Interior, lands within the indemnity limits of grants made by Congress to aid in the construction of railroads were subject to withdrawal by the United States for Governmental purposes or were subject to disposition by the United States to third persons, if, on the date of the withdrawal by the United States, or if, on the date of the disposition of the said indemnity lands to third persons, valid indemnity selections of said lands had not been made.

That under the provisions of the Act of July 25, 1866 (14 Stat. 239), as amended, Congress made a grant of lands to the Oregon & California Railroad Company to aid in the construction of a railroad from Portland, Oregon, to the California line, and thereafter primary and indemnity land grants limits were established for the use and benefit of the said Oregon & California Railroad Company; that prior to the ascertainment of a deficiency by the Secretary of the Interior in the said land grant to the said Oregon & California Railroad Company and prior to the filing of valid indemnity selections by the said Oregon & California Railroad Company, but at a time or times when the said land grant was in fact deficient, the Secretary of the Interior through error and mistake and without authority so to do, allowed the said Northern Pacific Railway Company to select certain odd-numbered sections within the indemnity limits of the grant to the said Oregon & California Railroad Company under

the provisions of the Act of July 1, 1898 (30 Stat. 620), and the Act of March 2, 1899 (30 Stat. 993), at a time when the
92 said lands were obligated to the said Oregon & California Railroad Company under the provisions of the said Act of July 25, 1866 (14 Stat. 239), and thereafter issued to the said Northern Pacific Railway Company patents for the said tracts of land so selected; that a schedule of the said lands as in this paragraph alleged is attached to this bill of complaint and marked Exhibit CC; that the execution and delivery of the said patents were without authority of law and occurred through error and mistake, and said patents were and are wrongful and void, all of which was at all times known to the said Northern Pacific Railway Company; that upon the issuance by the United States of the said patents to the Northern Pacific Railway Company, and by virtue of the said patents, the said Northern Pacific Railway Company sold the said lands to third persons and used the receipts therefrom for its own purposes, when it was not entitled to receive the said lands, or any of them, or any of the receipts therefrom inasmuch as the said Oregon & California Railroad Company was entitled to receive all of the said lands and all of the receipts therefrom, and as portions of the receipts of the said Oregon & California Railroad Company which were covered in the accounting between the United States and the Oregon & California Railroad Company under the provisions of the Act of June 9, 1916 (39 Stat. 218); that the United States is entitled to relief from and redress for the error and mistake as set forth in this paragraph to the end that the respective rights and obligations of the United States and the Northern Pacific Railway Company under the Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, may be, by an accounting and otherwise, ascertained, made certain, and adjudicated as by this bill contemplated.

XXXVII

That under the provisions of the Act of June 25, 1929 (46 Stat. 41), any and all lands within the indemnity limits of the land grants made by Congress to the Northern Pacific Railroad Company under the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, which on
93 June 5, 1924, were embraced within the exterior boundaries of any national forest or other Government reservation, and which lands in the event of a deficiency in the said land grants to the Northern Pacific Railroad Company upon the dates of the withdrawals of the lands for Government purposes,

would be, or were, available in whole or in part to the Northern Pacific Railroad Company, or its successor, the Northern Pacific Railway Company, by indemnity selection, or otherwise, in satisfaction of any such deficiency in said land grants, were by the said Act of June 25, 1929, taken out of and removed from the operation of said land grants and retained by the United States as part and parcel of the Government reservation wherein the said lands were and are situate, relieved, and freed from all claims which the said Northern Pacific Railroad Company, or its successor, the said Northern Pacific Railway Company, may have, or may have had, to acquire the said lands by indemnity selection or otherwise in satisfaction of said land grants, subject to the right of the said Northern Pacific Railroad Company, or the said Northern Pacific Railway Company, to receive compensation for the said indemnity lands to the extent and in the amounts, if any, the courts hold that compensation is due from the United States; that there is attached to this bill of complaint and made a part hereof as Exhibits O, P, and Q, lists showing each and all of the lands within the indemnity limits of the land grant made to the said Northern Pacific Railroad Company under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, which lands were on June 5, 1924, embraced in national forests or other Government reservations; that the said list includes any and all lands which prior to June 5, 1924, had been withdrawn for and which on said date were embraced within the exterior boundaries of any national forest or Government reservation, and which in the event of a deficiency in the said land grants to the Northern Pacific Railroad Company upon the dates of the withdrawals of the said indemnity lands for Governmental purposes would be, or were, available to the Northern Pacific Railroad Company, or its successor, the Northern Pacific Railway Company, by
94 indemnity selection or otherwise in satisfaction of any such deficiency in said land grants, but your plaintiff denies it should be required to compensate the said Northern Pacific Railroad Company, or its successor, the said Northern Pacific Railway Company, for any of the said Indemnity lands aforesaid.

That ever since the said indemnity lands were withdrawn as parts and parcels of the national forests and other Governmental reservations in which they now are situate and were situate on June 5, 1924, the legal title to the said lands and all of them has been in your plaintiff, and your plaintiff now is and has been in possession of the said lands at all times since they were so withdrawn; that vast areas of the said indemnity lands are wild

lands which are forested lands and mountainous lands which are remote from habitation, but all of the said lands now are and have been at all times since their withdrawal as aforesaid under the protection, improvement, administration, and control of your plaintiff at a cost to your plaintiff of approximately 4 cents per acre per annum; that not any of the defendants herein now are or ever have been in possession of any or all of the said lands.

XXXVIII

That under the provisions of the Act of June 25, 1929 (46 Stat. 41), all of the unsatisfied indemnity selection rights claimed by the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, or by any grantee or assignee of either or both, together with all claims to additional lands under and by virtue of the land grants contained in the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, or any other Acts of Congress supplemental or relating thereto, were declared forfeited to the United States.

XXXIX

That in the year 1896 there was incorporated under the laws of the State of New Jersey, the Northwestern Improvement Company, one of the defendants in this action; that ever since the said Northwestern Improvement Company was so incor-
95 porated, all of its outstanding capital stock has been and now is owned or controlled by the Northern Pacific Railway Company; that from time to time since the incorporation of the said Northwestern Improvement Company, there have been received by it from the Northern Pacific Railway Company and otherwise extensive tracts of the odd-numbered sections of lands situate within the primary and the indemnity limits and being parts and parcels of the land grant made by the Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; that the said Northern Pacific Railway Company by reason of its ownership of all of the outstanding capital stock of the said Northwestern Improvement Company has had ever since said Northwestern Improvement Company was incorporated and now has a complete beneficial interest in all the properties and profits of the said Northwestern Improvement Company; that each and all of the said lands so received by the said Northwestern Improvement Company were lands that were subject to all of the provisions of the said Act of July 2, 1864, as modified

and supplemented by the said Joint Resolution of May 31, 1870; that by reason of sales, leases, royalties, and otherwise, the said Northwestern Improvement Company has received large sums of money from and by reason of the said lands; that the said Northern Pacific Railway Company should in this action account for the said lands and the said moneys by reason of the said beneficial interest of the Northern Pacific Railway Company therein, in the same manner and to the same extent as though the said lands and the said moneys had at all times been carried and received in the name of the Northern Pacific Railway Company; that your plaintiff does not know and has no means of ascertaining which lands have been so received by the Northwestern Improvement Company and what moneys have been received by reason of said lands and which of said lands have been retained by the said Northwestern Improvement Company, but such information is shown by the books and documents of the said Northern Pacific Railway Company and/or the said Northwestern Improvement Company in their possession and/or subject to the control of the said Northern Pacific Railway Company.

96

XL

That on the date of the filing of this bill there were held by the said Northern Pacific Railway Company approximately 6,000,000 acres of lands which the said Northern Pacific Railway Company and/or its predecessors in interest received from your plaintiff under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, the said lands being separate and distinct from the aforesaid lands of the Northwestern Improvement Company, and being separate and distinct from any lands which have inured to the benefit of the said Northern Pacific Railway Company and/or its predecessors in interest under the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870, and now held in the name of any other subsidiary company of the said Northern Pacific Railway Company. The plaintiff does not know the legal description of the lands mentioned in this paragraph.

XLI

That in connection with the lands and moneys referred to and covered by Paragraphs XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXXV, XXVI, and XXXIX of this bill, plaintiff does not know and has no means of ascertaining the moneys which have been received from the sales, rentals, and

other uses of the said lands by the said Northern Pacific Railway Company and/or its predecessors in interest and which of the said lands have been and now are retained by the said Northern Pacific Railway Company for its own use and benefit; that the facts pertaining to the said moneys and lands are exclusively and peculiarly within the knowledge or control of the said Northern Pacific Railway Company; that said facts and all of them are material to plaintiff's cause and necessary for plaintiff's relief; that much of the information supporting the facts alleged in this bill, in addition to the facts referred to in the paragraphs last above mentioned, is exclusively and peculiarly within the knowledge or control of the defendant, Northern Pacific Railway Company, and the facts shown thereby are material to
97 plaintiff's cause and the proof thereof is necessary to plaintiff's relief.

XLII

That the matters and things herein alleged are cognizable in a court of equity, and the plaintiff is without a plain, adequate, and complete remedy at law.

Wherefore, plaintiff prays that the defendant, Northern Pacific Railway Company, and each and all of the defendants named herein, be required to answer this bill of complaint, as provided by law and by the rules of this Court, but not under oath, and prays:

(1) That this Court decree that by virtue of the provisions of the Act of June 25, 1929 (46 Stat. 41), any and all lands within the indemnity limits of the land grants made by Congress to the Northern Pacific Railroad Company under the Act of July 2, 1864 and the Resolution of May 31, 1870, which on June 5, 1924 were embraced within the exterior boundaries of any national forest or other Government reservation, and which in the event of a deficiency in the said land grants to the Northern Pacific Railroad Company upon the dates of the withdrawals of the said indemnity lands for Government purposes would be or were available to the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, by indemnity selection or otherwise in satisfaction of any such deficiency in said land grants, were by the said Act of June 25, 1929 taken out of and removed from the operation of the said land grants and were thereby retained by the United States as part and parcel of the Government reservations wherein they were situate, relieved and freed from any existing claims of the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, to acquire said lands by indemnity selection or otherwise in satisfac-

tion of the said land grants, and that the Court describe the said lands and by its decree remove any cloud cast upon the title thereto by the claims of said defendants and confirm and quiet the title to the said lands in the United States; that the Court ascertain, set forth, and decree the amount of compensation, if any, the said Northern Pacific Railway Company and/or
98 its predecessors in interest, or any and all of the defendants named in this bill, are entitled to receive from the United States for any or all of said indemnity lands, specifying in said decree, if necessary, a time within which Congress may enact such legislation and appropriate such money as may be sufficient to meet the requirements of the decree.

That this Court, by reason of the matters set forth in this bill, find and decree that the said Northern Pacific Railway Company and/or its predecessors in interest, and any or all of the defendants named in this bill, are not entitled to any compensation from the United States on account of the retention by the plaintiff of any or all of the said indemnity lands.

(2) That this Court decree that all of the unsatisfied indemnity selection rights, if any exist, claimed by the Northern Pacific Railway Company and/or its predecessors in interest, together with all claims to additional lands under and by virtue of the land grants contained in the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, or any Acts of Congress supplemental and relating thereto, were by the Act of June 25, 1929, declared forfeited to the United States, and that ever since June 25, 1929, the said indemity selection rights and the said claims have been and now are forfeited to the United States, and that this Court by its decree remove any cloud cast upon any of the lands of your plaintiff by the said indemnity selection rights, and the said claims declared forfeited by the said Act of June 25, 1929 (46 Stat. 41).

(3) That this Court determine the extent to which the Northern Pacific Railway Company and/or its predecessors in interest have failed to comply with the covenants contained in the Joint Resolution of May 31, 1870, relating to the lands granted under the provisions of the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, and pertaining to (a) the disposition of the granted lands by settlement and preemption five years after the completion of the
99 entire railroad and (b) pertaining to the public sale of the granted land upon the foreclosure of any mortgage authorized by the said Joint Resolution; that this Court decree that the said Northern Pacific Railway Company now perform either or both of the said covenants to the extent that it is now possible

for the said company to perform the said covenants or either or both of them, and where it is found by the Court that it is not now possible for the said Northern Pacific Railway Company to perform either or both of the said covenants, that your plaintiff have such relief as this Court may deem right and proper; that this Court decree that any and all moneys received by the said Northern Pacific Railway Company and/or its predecessors in interest, from or by reason of the said granted lands, after breaches of either one or both of the said covenants, be declared to have been received in trust by the said Northern Pacific Railway Company and/or its predecessors in interest for the use and benefit of the plaintiff, and that the plaintiff be awarded judgment against the Northern Pacific Railway Company for such portions of said moneys, or their equivalent, as this Court may find the plaintiff entitled to receive.

(4) That an adjustment and accounting may be had by this Court to the end that there shall be determined the amount of lands the said Northern Pacific Railway Company and/or its predecessors in interest were entitled rightfully to receive from the United States under the land grants contained in the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870; the amount of lands the said companies have received rightfully and otherwise from the United States under the said land grants; the amount of lands or money, or either or both, now due the plaintiff or the said Northern Pacific Railway Company and/or its predecessors in interest by reason of *aech* and all of the transactions set forth in this bill, as the Court may deem proper; and that this Court decree that the plaintiff have judgment against the said Northern Pacific Railway Company for the amount with interest found by this Court to be due your plaintiff.

(5) That this Court perpetually enjoin the said Northern
100 Pacific Railway Company and/or its predecessors in interest, or any of their agents, officers, or employees, from presenting to any officer of your plaintiff any claim for indemnity lands based upon the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, or any Acts supplemental thereto.

(6) That the defendant, Northern Pacific Railway Company, be required at the proper time and in the proper manner, in conformity with the law and the rules and orders of this Court, to disclose the information by answers to interrogatories or otherwise, and produce the documents and records within its possession or control, material to the cause of action alleged in this bill of complaint and which is within the knowledge, possession, or control of said defendant as in this bill alleged, or otherwise.

(7) That this Court render any and all such judgments and decrees as equity may require to bring about a full and complete adjudication of the respective rights of the plaintiff, the Northern Pacific Railway Company, and each and all of the defendants named herein, with respect to the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, and the grant of lands provided therein; that the plaintiff be permitted to amend this bill of complaint in respect to matters not now known to it but within the knowledge of the defendants, and to conform to the proof.

The plaintiff prays for such other and different relief as may be just and equitable.

WILLIAM D. MITCHELL,
Attorney General of the United States.
SETH W. RICHARDSON,
Assistant Attorney General of the U. S.
ROY C. FOX,
United States Attorney for the Eastern District of Washington.
D. F. McGOWAN,
Special Assistant to the Attorney Gen'l.
E. E. DANLY,
Special Assistant to the Attorney Gen'l.

162 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Answer of Bankers Trust Company

Filed Dec. 5, 1930

The defendant Bankers Trust Company answers the complaint in the above entitled suit as follows:

1. Admits that this suit is brought by and under the direction of the Attorney General of the United States by and on behalf of the United States under the provisions of the Acts of June 25, 1929; as to the purposes of the suit, this defendant refers to the bill of complaint herein; and admits that the suit arises under the laws of the United States and that the amount involved therein is in excess of $100,000.

2. Admits that defendant Northern Pacific Railroad Company is a Federal corporation organized and existing under the provisions of the Act of July 2, 1864; this defendant is without knowledge as to whether or not such railroad company has an office or place of business in New York City.

This defendant is without knowledge as to defendant Northern Pacific Railroad Company as reorganized in 1875, the means if any by which such defendant came into existence, if it exists or ever existed, and the principal place of business, if any, of such defendant, if any.

Admits that defendant Northern Pacific Railway Company is a corporation organized under the laws of the State of Wisconsin and has its general offices at St. Paul, Minnesota.

This defendant is without knowledge concerning defendant Northwestern Improvement Company.

163 Admits that this defendant and defendants Guaranty Trust Company and City Bank Farmers Trust Company are corporations organized and existing under the laws of the State of New York, and having their principal places of business in New York City; admits that this defendant and defendant City Bank Farmers Trust Company each claims interests adverse to the plaintiff in the subject matter of the suit; and is without knowledge with respect to whether or not Guaranty Trust Company claims an interest adverse to the plaintiff in the subject matter of this suit.

3. Admits that under and by virtue of the Act of July 2, 1864, the United States created a body corporate with a federal franchise by the name, style, and title of the Northern Pacific Railroad Company authorized to build a railroad from Lake Superior to Puget Sound, and refers to said Act for the purposes and provisions thereof; admits that the Resolution of May 7, 1866, extended the time for commencing and completing the Northern Pacific Railroad for two years; admits that the resolution of July 1, 1868, amended the Act of 1864 as set forth in the complaint; admits that the Resolution of March 1, 1869, dealt with the Northern Pacific Railroad Company and refers to that resolution for the terms and provisions thereof; admits that the Resolution of April 10, 1869, dealt with the Northern Pacific Railroad Company, and for the terms of said Resolution refers thereto; admits that the Joint Resolution of May 31, 1870, further dealt with the Northern Pacific Railroad, and for the terms and provisions thereof refers thereto; and except as so admitted, denies each and every allegation of paragraph III of the bill of complaint herein.

4. For the terms and provisions of the Act of July 2, 1864, this defendant refers thereto; and denies each and every allegation of paragraph IV of said bill.

5. Admits that said Act of July 2, 1864, was accepted by the defendant Northern Pacific Railroad Company; as to the legal effect thereof, this defendant refers to said Act; and except as so

admitted, denies each and every allegation contained in paragraph V of said bill.

6. With respect to the requirements of the Act of July 2, 1864, this defendant refers to said Act and denies each allegation with respect thereto; as to each and every other allegation of paragraph VI of said bill, this defendant is without knowledge.

7. This defendant is without knowledge as to each and every allegation contained in paragraph VII of said bill.

8. Denies that the Act of July 2, 1864, or the Joint Resolution of May 31, 1870, required the construction, equipment, furnishing or completion of the entire road by any date; and except as so denied, this defendant is without knowledge as to each and every allegation contained in paragraph VIII of the bill.

9. This defendant is without knowledge with respect to each and every allegation in paragraph IX of said bill.

10. This defendant is without knowledge with respect to each and every allegation in paragraph X of said bill.

11. This defendant is without knowledge with respect to each and every allegation in paragraph XI of said bill.

164 12. Denies that any lands exchanged for stock as alleged in paragraph XII of the bill should have been sold at public sale in the states or territories where situate, in single sections or in subdivisions thereof, to the highest and best bidder or otherwise, upon foreclosure of the mortgage of July 1, 1870; this defendant is without knowledge with respect to each and every other allegation contained in paragraph XII of said bill.

13. Admits that the final date specified by the various acts and resolutions for the completion of the entire railroad and telegraph line contemplated by the Act of July 2, 1864, and subsequent acts was July 4, 1879; denies that the requirement of the Joint Resolution of May 31, 1870, that certain lands under certain conditions should be subject to settlement and preemption like other lands at a price not exceeding $2.50 per acre applied to the lands granted by the Act of July 2, 1864, or any other lands except those granted by said Joint Resolution; denies that said requirement ever became operative with respect to the lands granted by said Joint Resolution; denies that on July 4, 1884, or at any time thereafter there were within the exterior limits of the Northern Pacific land grant, lands which should have been opened to settlement and preemption under and by virtue of said requirements of the Joint Resolution of May 31, 1870; this defendant is without knowledge as to whether or not any of said lands were ever opened to settlement and preemption by the Northern Pacific Railway Company or its predecessors; admits that the Northern Pacific Railway Company sold various quantities of such lands to such persons and under such prices and conditions as suited

its purpose, but this defendant is without knowledge as to whether or not its predecessor also did so; denies that the failure of any or all of the said companies to open any or all of such lands to settlement and preemption was a breach of any contract or of the provisions of the Act of July 2, 1864, or of the provisions of the Joint Resolution of May 31, 1870, or was in defeat of the policy of the United States with respect to the disposition of its public domain as set out in said Act or in said Joint Resolution.

14. Refers to the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, for the intent and purpose thereof, and denies each and every allegation with respect thereto; admits that no line of railroad was constructed by the Northern Pacific Railroad Company or the Northern Pacific Railway Company between Wallula, Washington, and Portland, Oregon; this defendant is without knowledge as to the remaining allegations in paragraph XIV of the bill.

15. Refers to the Act of July 2, 1864, and Joint Resolution of May 31, 1870, for the intent and purpose of Congress in connection therewith, and denies each and every allegation in paragraph XV of the bill with respect thereto; this defendant is without knowledge with respect to each and every other allegation in paragraph XV of the bill.

16. Admits that Exhibits G, H, I, J, K, and L are correct copies of the mortgages described in paragraph XVI of the bill, except that such mortgages were made by Northern Pacific Railroad Company. This defendant is without knowledge as to each and every other allegation contained in said paragraph XVI.

17. This defendant is without knowledge as to the allegations contained in paragraph XVII of the bill.

165 18. Answering paragraph XVIII of the bill of complaint:

This defendant is without knowledge as to the allegations contained in the first subparagraph of said paragraph XVIII.

Admits that substantially all of the properties held by the Northern Pacific Railroad Company passed into the possession and control of defendant Northern Pacific Railway Company and thereafter said Northern Pacific Railway Company claimed and now claims to own and exercise complete ownership over said properties (except such as have been disposed of) and then claimed and now claims, as successor in interest of said Northern Pacific Railroad Company to be entitled to receive further and additional lands from the United States under and by virtue of the Act of July 2, 1864, and the Joint Resolution of May 31, 1870; this defendant is without knowledge as to the remaining

allegations contained in the second subparagraph of said paragraph XVIII.

Admits that a copy of the Reorganization Plan dated March 16, 1896, is attached to the bill of complaint and marked "Exhibit M". This defendant is without knowledge as to the remaining allegations contained in the third subparagraph of paragraph XVIII.

With respect to the nature and legal effect of the Reorganization Plan this defendant refers thereto and denies each and every allegation with respect thereto; admits that the parties to said Plan undertook, on the basis set forth therein, to and did reorganize the affairs of the Northern Pacific Railroad Company, and that the Northern Pacific Railway Company succeeded to the business and properties of Northern Pacific Railroad Company; denies the remaining allegations contained in the fourth subparagraph of paragraph XVIII.

With respect to the intent and purposes of the subscribers to said Plan this defendant refers thereto, and likewise refers thereto for what was contemplated and provided therein; denies each and every other allegation contained in the fifth subparagraph of Paragraph XVIII.

With respect to the provisions of the Plan covering the capitalization of the successor company and the security for its bonds, this defendant refers to the Plan; and denies each and every allegation contained in the sixth subparagraph of paragraph XVIII.

This defendant is without knowledge as to each and every allegation of the seventh subparagraph of paragraph XVIII.

Admits that the Reorganization Plan was adopted on or about March 16, 1896, and was thereafter in effect and was consummated; this defendant is without knowledge as to the remaining allegations contained in the eighth subparagraph of said paragraph XVIII.

Admits that the properties of the Northern Pacific Railroad Company including the lands granted by the United States thereto which were owned thereby were acquired by the Northern Pacific Railway Company; this defendant is without knowledge as to the other allegations contained in the ninth subparagraph of said paragraph XVIII.

Admits that by the Joint Resolution of May 31, 1870, Congress authorized the Northern Pacific Railroad Company to issue bonds and secure the same by mortgage on its property including the lands granted by the Act of July 2, 1864, and by
166 the Joint Resolution of May 31, 1870, and that the language quoted in the tenth subparagraph of said paragraph XVIII is a part of said Joint Resolution.

This defendant is without knowledge as to the allegations contained in the eleventh subparagraph of said paragraph XVIII.

Admits that under and by virtue of said Reorganization Plan the lands which had been granted by the United States to the Northern Pacific Railroad Company under the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, were acquired by the Northern Pacific Railway Company; as to what was intended by said Reorganization Plan, this defendant refers thereto, and denies each and every allegation with respect thereto; this defendant is without knowledge as to the remaining allegations in the twelfth subparagraph of paragraph XVIII.

This defendant is without knowledge as to the intent of the parties and the subscribers of such Reorganization Plan to acquire for the successor company contemplated thereby the 35,000,000 acres more or less of the lands contained in the land grant made by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870; denies each and every other allegation contained in the thirteenth subparagraph of said paragraph XVIII.

Admits that upon the acquisition by the Northern Pacific Railway Company of said properties including said granted lands, they were subjected to and placed under the Prior Lien Mortgage and General Lien Mortgage issued by the Northern Pacific Railway Company and that the Northern Pacific Railway Company has dealt with such lands as it pleased, subject, however, to the restrictions and provisions of said mortgages; this defendant is without knowledge as to the other allegations contained in the last subparagraph of said paragraph XVIII.

19. This defendant is without knowledge as to the allegations contained in paragraph XIX of said bill.

20. This defendant is without knowledge as to the number of acres which the Northern Pacific Railway Company and its predecessor in interest have received from the government, denies that any acres were wrongfully received. This defendant is also without knowledge as to whether or not in addition to lands properly credited to the Northern Pacific Railroad Company or its successor by the Secretary of the Interior, there were any areas of lands which through errors of fact or of law were credited under said land grants, or that as a consequence of any errors of fact or of law the Northern Pacific Railway Company has already been over compensated in lands by the United States, or that the Northern Pacific Railway Company or its predecessor in interest are entitled to any additional land. Denies that any lands were so credited by fraud, or that by fraud the Northern Pacific Railway Company has already been over compensated in lands by the United States, or that said

railway company is now and has been wrongfully asserting any claim for additional land in satisfaction of land grants or otherwise. This defendant refers to the letter of March 25, 1925, for its contents and effect, and denies each and every allegation with respect thereto. Admits the other allegations contained in paragraph XX of the bill of complaint herein.

21. This defendant refers to the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, for the provisions thereof, and denies each and every allegation with respect thereto; this
167 defendant is without knowledge as to the other allegations contained in the first subparagraph of paragraph XXI of said bill.

Defendant admits that the Northern Pacific Railway Company is contending that a deficiency exists in the land grants and in furtherance thereof has filed and recorded with the officers of the Interior Department certain claims for additional lands, the right to which is asserted under the Act of July 2, 1864, and the Joint Resolution of May 31, 1870. This defendant is without knowledge as to the other allegations contained in the second subparagraph of said paragraph XXI.

This defendant is without knowledge as to any of the allegations contained in the last subparagraph of paragraph XXI of said bill.

22. With respect to the allegations contained in the remaining paragraphs of the bill of complaint:

In so far as such allegations refer to acts, resolutions, or treaties of the United States, this defendant refers thereto for the provisions and effect thereof and the intention of Congress with respect thereto, and denies each and every allegation as to the provisions or effect thereof, or the intention of Congress in passing them.

As to each and every other allegation contained in the remaining paragraphs of the bill of complaint, this defendant is without knowledge.

FURTHER ANSWERING THE BILL OF COMPLAINT AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE, DEFENDANT BANKERS TRUST COMPANY ALLEGES

23. On and before March 16, 1896, and until August 10, 1911, The Mercantile Trust Company was a corporation organized and existing under the laws of the State of New York and was doing business in New York City. On said latter date, The Mercantile Trust Company was merged into defendant Bankers Trust Company and defendant Bankers Trust Company thereby became the trustee under the mortgage referred to in the next paragraph.

24. On or about November 10, 1893, defendant Northern Pacific Railway Company made, executed, and delivered to The Mercantile Trust Company its mortgage dated as of the date just mentioned and known as its Prior Lien Mortgage, copy of which is attached hereto and marked "Exhibit A", which mortgage provided for the issuance of said railway company's Prior Lien Railway and Land Grant Gold Bonds in an amount not to exceed in the aggregate $130,000,000 principal amount at any one time outstanding. There have been authenticated and delivered by The Mercantile Trust Company and defendant Bankers Trust Company pursuant to the provisions of said Prior Lien Mortgage $121,650,000 principal amount of such bonds, and there are now outstanding in the hands of the public $107,399,600 principal amount of such bonds.

25. In said mortgage it is recited (and this defendant refers to the mortgage, a copy of which is attached hereto as "Exhibit A", for the exact provisions of such mortgage) that pursuant to certain decrees made and entered in the United States Circuit Court for the Eastern District of Wisconsin and other Circuit Courts in ancillary causes pending therein, the railroad and telegraph lines, property, and franchises of the defendant
168 Northern Pacific Railroad Company and also the rights of said company under grants of land made by Congress and other properties, were sold to the defendant Northern Pacific Railway Company and such sales were duly confirmed and the properties thus sold were conveyed and assigned to said railway company.

26. In reliance thereon and upon such decrees of sale and on confirmation thereof and of conveyances and assignments to defendant Northern Pacific Railway Company of the property subject thereto, The Mercantile Trust Company joined in the execution and delivery of said Prior Lien Mortgage as party of the second part; and there were conveyed by said mortgage to The Mercantile Trust Company as Trustee all of the properties so obtained.

27. The Mercantile Trust Company as Trustee for the holders of outstanding bonds secured thereby, took and held such properties, and defendant Bankers Trust Company holds such properties as innocent purchasers for value.

FURTHER ANSWERING THE BILL OF COMPLAINT AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE, DEFENDANT BANKERS TRUST COMPANY ALLEGES

28. This defendant realleges the matters contained above in paragraphs 23 to 25, inclusive.

29. The holders of the $107,399,600 principal amount of Prior Lien Railway and Land Grant Gold Bonds now outstanding in the hands of the public became such in reliance upon the provisions and recitals in the Prior Lien Mortgage which secures their bonds, upon the conveyance to The Mercantile Trust Company of the railway and telegraph properties of the defendant Northern Pacific Railway Company, the lands granted to that company and its predecessors by Congress and the railway company's other properties, upon the conveyance to said defendant of such lands and properties and upon the title and ownership of the defendant Northern Pacific Railway Company in said lands and properties.

30. The holders of said $107,399,600 principal amount of said bonds are innocent purchasers for value of said properties and lands so far as the same are necessary in order to secure the payment thereof.

FURTHER ANSWERING THE BILL OF COMPLAINT AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE, DEFENDANT BANKERS TRUST COMPANY ALLEGES

31. Insofar as a cause of action is stated for the cancellation, vacation, or annulment of any United States patent which was issued more than six years prior to the bringing of this suit, defendant Bankers Trust Company alleges that this suit was not brought within six years after the date of the issuance of such patent or patents.

FURTHER ANSWERING THE BILL OF COMPLAINT AND FOR A FOURTH SEPARATE AND COMPLETE DEFENSE, DEFENDANT BANKERS TRUST COMPANY ALLEGES

32. Plaintiff is guilty of laches, as appears from the face of the complaint, inasmuch as the principal acts complained of took place from the year 1864 to the year 1900, all of which such acts took place more than thirty years ago and some as
169 many as sixty or more years ago, which acts could as well have been known to the plaintiff then as now. Most of the persons who had knowledge concerning the facts alleged in the bill of complaint are dead and evidence of many, if not of most, of such facts cannot now be obtained.

FURTHER ANSWERING THE BILL OF COMPLAINT AND FOR A FIFTH SEPARATE AND COMPLETE DEFENSE, DEFENDANT BANKERS TRUST COMPANY ALLEGES

33. Plaintiff is estopped from obtaining the relief sought in the bill of complaint because plaintiff has dealt with defendant

Northern Pacific Railroad Company and defendant Northern Pacific Railway Company as either the corporation created by the Act of 1864 or the successor in interest thereof which succeeded to all the right, title, and interest of said Railroad Company with respect to the lands granted by the plaintiff by said Act of 1864 and Joint Resolution of 1870.

34. Plaintiff has required defendant Northern Pacific Railroad Company and defendant Northern Pacific Railway Company to transport mail, troops, and property of the plaintiff on the railroad operated by said two companies at reduced rates, as provided by the Act of 1864, and has so required said companies to transport such mail, troops, and property of the plaintiff's at reduced rates down to and including the present time.

35. The Congress of the United States has passed a large number of acts which have recognized the Northern Pacific Railroad Company as the corporation created by the Act of 1864, and has also passed a large number of acts which recognized the Northern Pacific Railway Company as the successor in interest of said Railroad Company. Said acts which recognized the Northern Pacific Railroad Company as the Corporation created by the Act of 1864 required the Railroad Company to pay survey fees to the plaintiff, ratified agreements with Indians for sales of portions of their reservations required for use by the Railroad Company for right-of-way and otherwise, appropriated funds for the transportation of public property on such railroad, provided relief to settlers who erroneously made claims on lands of the railroad company, and empowered the Northern Pacific to exchange such lands for other government lands, forfeited lands opposite parts of railroad lines never completed, and provided for the mineral classification of lands within and without the indemnity limits. Said acts which recognize the Northern Pacific Railway Company as the successor in interest of the Railroad Company and entitled to all the rights, interests, privileges, and properties of the Railroad Company, provided for the adjustment of conflicting claims with settlers on government lands in indemnity limits, set aside lands for forest reserves, and permitted the Railway Company to select other lands in lieu thereof, validated conveyances of lands by the Railroad or Railway Companies, appropriated money for the classification of lands within the land grant, and in numerous instances permitted the Railway Company to select lands in lieu of lands of the Railway Company settled upon by various persons. The following are some of such Acts:

Act of July 17, 1870, 16 Stat. 291, 305.
Act of July 10, 1882, 22 Stat. 157.

Act of July 4, 1884, 23 Stat. 76, 89.
Act of October 19, 1888, 25 Stat. 567.
Act of March 1, 1889, 25 Stat. 771.
170 Act of September 29, 1890, 26 Stat. 496.
Act of October 1, 1890, 26 Stat. 647.
Act of February 20, 1893, 27 Stat. 468.
Act of March 3, 1893, 27 Stat. 612, 631.
Act of February 26, 1895, 28 Stat. 683.
Act of February 26, 1896, 29 Stat. 17, 22.
Act of June 11, 1896, 29 Stat. 413, 436.
Act of June 3, 1896, 29 Stat. 245.
Act of July 1, 1898, 30 Stat. 597, 621.
Act of March 2, 1899, 30 Stat. 993.
Act of March 2, 1901, 31 Stat. 950.
Act of April 28, 1904, 33 Stat. 538.
Act of March 3, 1905, 33 Stat. 1014.
Act of May 17, 1906, 34 Stat. 197.
Act of June 25, 1910, 36 Stat. 703, 739.
Act of March 4, 1911, 36 Stat. 1289, 1307.
Act of August 26, 1912, 37 Stat. 595, 609.
Act of October 22, 1913, 38 Stat. 208, 217.
Act of July 29, 1914, 38 Stat. 559, 571.
Act of March 4, 1915, 38 Stat. 1138, 1148.
Act of September 8, 1916, 39 Stat. 801, 817.
Act of February 27, 1917, 39 Stat. 946.
Act of April 17, 1917, 40 Stat. 2, 18.
Act of February 28, 1919, 40 Stat. 1204.
Act of December 15, 1921, 42 Stat. 1573.
Act of September 20, 1922, 42 Stat. 1710.
Act of February 28, 1923, 42 Stat. 1782.
Act of March 3, 1925, 43 Stat. 1594.

36. Plaintiff, through its various Secretaries of the Interior, Attorneys General, and other executive officers, recognized from time to time the Northern Pacific Railroad Company and the Northern Pacific Railway Company as the companies entitled to the benefits of the provisions of the Act of 1864 and subsequent acts and joint resolutions granting lands in connection with the building of the Northern Pacific railroad. In the following opinions and decisions there was such recognition:

Opinion of Attorney General, dated Feb. 6, 1897, 21 Ops. of Atty. Gen. 486.

Opinion of Secretary of the Interior, dated Nov. 21, 1899, 29 L. D. 316.

Opinion of Secretary of the Interior, dated Dec. 26, 1899, 29 L. D. 387.

Opinion of Attorney General, dated April 12, 1905, 25 Ops. Atty. Gen. 401.

Decision of Secretary of Interior, dated July 17, 1909, 38 L. D. 77.

37. In reliance upon those acts, opinions and decisions set forth in paragraphs 35 and 36 hereof, which had been passed or given prior thereto, The Mercantile Trust Company jointed in the execution of the Prior Lien Mortgage referred to hereinbefore, and undertook the execution of the trusts thereby imposed, and continued to act as trustee under such mortgage; and in similar reliance from time to time upon such acts and matters as they came into existence, defendant Bankers Trust Company has continued to act as trustee under said mortgage.

FURTHER ANSWERING THE BILL OF COMPLAINT AND FOR A SIXTH SEPARATE AND COMPLETE DEFENSE, DEFENDANT BANKERS TRUST COMPANY ALLEGES

38. This defendant re-alleges the matters appearing above in paragraphs 35 and 36 inclusive.

39. In reliance upon all or part of such acts and matters, many persons, members of the general public, have purchased and continued to hold the Prior Lien Railway and Land Grant
171 Gold Bonds of the defendant Northern Pacific Railway Company, which bonds are secured by said Prior Lien Mortgage; and such persons now hold $107,399,600 principal amount of such bonds.

FURTHER ANSWERING THE BILL OF COMPLAINT AND FOR A SEVENTH SEPARATE AND COMPLETE DEFENSE, DEFENDANT BANKERS TRUST COMPANY ALLEGES

40. Insofar as the bill of complaint attempts to set forth a cause of action that the defendant Northern Pacific Railway Company is entitled to no compensation for the lands appropriated by the plaintiff by the Act of June 25, 1929, said bill contains insufficient facts to constitute a valid cause of action in equity.

FURTHER ANSWERING THE BILL OF COMPLAINT AND FOR AN EIGHTH SEPARATE AND COMPLETE DEFENSE, DEFENDANT BANKERS TRUST COMPANY ALLEGES

41. Insofar as the bill of complaint attempts to set forth a cause of action that the indemnity selection rights of the defendant Northern Pacific Railway Company have been and are now forfeited, said bill of complaint contains insufficient facts to constitute a valid cause of action in equity.

FURTHER ANSWERING THE BILL OF COMPLAINT AND FOR A NINTH SEPARATE AND COMPLETE DEFENSE, DEFENDANT BANKERS TRUST COMPANY ALLEGES

42. Insofar as said bill of complaint attempts to set forth a cause of action that the defendant Northern Pacific Railway Company or defendant Northern Pacific Railroad Company has violated the terms of the Joint Resolution of May 31, 1870, with respect to the settlement and preemption of lands and sale of lands upon foreclosure, or for a decree for moneys received from the sale of such lands, or for a decree requiring the performance of any such provisions, said bill of complaint contains insufficient facts to constitute a valid cause of action in equity.

FURTHER ANSWERING THE BILL OF COMPLAINT AND FOR A TENTH SEPARATE AND COMPLETE DEFENSE, DEFENDANT BANKERS TRUST COMPANY ALLEGES

43. Insofar as the bill of complaint attempts to set forth a cause of action for an adjustment or accounting, except the cause of action for which a decree is prayed in paragraph (1), excluding, however, the last paragraph thereof, of the prayer, said bill contains insufficient facts to constitute a valid cause of action in equity.

FURTHER ANSWERING THE BILL OF COMPLAINT AND FOR AN ELEVENTH SEPARATE AND COMPLETE DEFENSE, DEFENDANT BANKERS TRUST COMPANY ALLEGES

44. Insofar as said bill of complaint attempts to set forth a cause of action for a decree of injunction against presenting any further claims for indemnity lands, said bill contains insufficient facts to constitute a valid cause of action in equity.

172 Wherefore, defendant Bankers Trust Company prays:

That the Court dismiss said bill of complaint except with respect to the matters referred to below.

That the grants made by the United States to the Northern Pacific Railroad Company were and are deficient and that the court determine the compensation to which the Northern Pacific Railway Company is entitled for lands taken by the Act of June 25, 1929, and enter a decree therefore with interest.

And this defendant further prays for a decree in its favor including its costs and disbursements.

WHITE & CASE,
14 Wall Street, New York, N. Y.
E. J. CANNON,
Spokane, Washington,
Solicitors for Defendant Bankers Trust Company.

280 In United States District Court

Stipulation amending answer

Filed Jan. 11, 1934

It is hereby stipulated by and between the plaintiff in the above entitled cause and the defendants therein, Northern Pacific Railway Company, Northwestern Improvement Company, Bankers Trust Company, Guaranty Trust Company, and City Bank Farmers Trust Company, subject to the approval of said Court:

1. That the Defendant Bankers Trust Company may amend its answer by adding thereto a twelfth separate and complete defense, to follow immediately after the eleventh separate and complete defense, as follows:

Further answering the Bill of Complaint and for a Twelfth separate and complete defense, Defendant Bankers Trust Company alleges:

45. On the third day of September 1897, in the Circuit Court of the United States, in and for the District of Minnesota, Fifth Division, this plaintiff filed its bill in equity entitled, "The United States of America, Complainant vs. The Northern Pacific Railroad Company, a corporation: The Northern Pacific Railway Company, a corporation, and Edwin H. McHenry and Frank G. Bigelow, as Receivers of The Northern Pacific Railroad Company. Defendants," in which bill, as amended, the plaintiff alleged:

"That the defendant the Northern Pacific Railroad Company is and was at all the times hereinafter stated a railroad corporation duly created, organized, and existing under a certain act of Congress entitled 'An Act Granting land to aid in the construction of a railroad and telegraph line from Lake
281 Superior to Puget Sound on the Pacific Coast by the northern route' approved July 2nd, 1864, and the Acts amendatory thereof and supplemental thereto, and having its principal place of business in the city of Saint Paul, County of Ramsey, and State of Minnesota."

In said bill of complaint the plaintiff set out the provisions of said Act of July 2, 1864, relating to the grant of lands to the Northern Pacific Railroad Company, its successors and assigns, and alleged that the City of Duluth was the eastern terminus or eastern initial point of the grant to the Northern Pacific Railroad Company, and that a certain tract of land therein described was, prior to the 22nd day of April 1895, a part of the public domain of the United States lying and being more than ten

miles east of the aforesaid eastern terminus and without the limits of the grant to said Northern Pacific Railroad Company under said Act of July 2nd, 1864, and alleged further that on the 22nd day of April 1895, ministerial officers of the United States through inadvertence and mistake conveyed by patent the described tract of land to the Northern Pacific Railroad Company under the erroneous impression and mistaken belief that said tract of land lay within the limits of the aforesaid grant and plaintiff prayed that said tract of land be restored to the plaintiff. Defendant Northern Pacific Railroad Company, in the joint answer filed by it and the Receivers of the Northern Pacific Railroad Company, admitted that it was then and at all times mentioned in the bill of complaint had been a railroad corporation created, organized and existing under the Act of July 2, 1864. The case was tried on an agreed statement of facts made on the 28th day of October 1898, in which the parties stipulated:

282 "That the defendant, The Northern Pacific Railroad Company, is a corporation created, organized and existing under and by virtue of an act of congress approved July 2, 1864, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route', and the acts and joint resolutions of congress supplemental thereto and amendatory thereof."

In said agreed statement it was further stipulated that the Northern Pacific Railroad Company constructed its line of railroad from Ashland, Wisconsin, to Wallula Junction, in the State of Washington, and from a point sixteen miles north of Wallula Junction over and across the Cascade Mountains to the City of Tacoma, in the State of Washington, and from Tacoma to Portland, in the State of Oregon, and that the whole of said line of railroad was accepted by the President of the United States as provided in said Act of Congress of July 2, 1864. After trial and argument a decree was entered on the 20th day of February 1899, by which it was ordered, adjudged, and decreed that the bill of complaint of the complainant be dismissed for want of equity. Thereafter an appeal from said decree was taken by the United States to the Circuit Court of Appeals of the Eighth Judicial Circuit and the decree below was affirmed in a decision made on the 10th day of July 1899, reported in 95 Federal Reporter, page 864. Thereafter an appeal was taken by the United States from the decree of the Circuit Court of Appeals to the Supreme Court of the United States and the decree of the Circuit Court of Appeals was affirmed in a decision made

on the 16th day of April 1900, and reported in Volume 177 U. S., page 435.

283 46. On the 27th day of July 1897, the plaintiff herein filed in the Circuit Court of the United States for the District of Washington, Western Division, a bill of complaint entitled, "The United States of America, Plaintiffs, vs. The Northern Pacific Railroad Company, and the Northern Pacific Railway Company, Defendants," wherein it was alleged "that the defendant, the Northern Pacific Railroad Company, is a corporation organized and existing under and by virtue of an Act of Congress, approved on the 2d day of July 1864, entitled 'An Act granting lands to aid in the construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern Route'"; that certain tracts of land situated in the Western Division of the District of Washington comprising several thousand acres were owned by the United States on the 24th day of May 1895, and on the 27th day of May 1895; that in a certain suit begun in the Circuit Court of the United States, for the Eastern District of Wisconsin, wherein the Farmers' Loan and Trust Company, of New York, was plaintiff, and the Northern Pacific Railroad Company and others were defendants, the court

"having then full and competent jurisdiction in the premises, proceeded to foreclose a certain mortgage against the said Northern Pacific Railroad Company, and thereafter, and during the pendency of said action, an ancillary bill was filed and subsequent proceedings were had in the same case in the Circuit Court of the United States, for the District of Washington, and in the Northern Division thereof, in which said proceedings the said Circuit Court for the District of Washington, and the Northern Division thereof, having full power in the premises, did, on or about the 25th day of July 1895, order, direct, and decree that all of the interest of the said Northern Pacific Railroad Company in the above described, and other lands, be sold to satisfy the said mortgage and other indebtedness of said company, and that the said lands were sold to the Northern Pacific Railway Company,"

and it was further alleged in said bill of complaint that
284 the Northern Pacific Railway Company had acquired the said lands as the successor in interest of the said Northern Pacific Railroad Company, if they had acquired the same, and that the Northern Pacific Railway Company held the same by reason of purchase at a public sale held at the City of Seattle, in the State of Washington, under and by virtue of a decree of the said courts dated the 3rd day of August 1895; that the said

lands so acquired were held by the Railway Company under said decrees and by reason of the said sale as successor of the said Northern Pacific Railroad Company; and that patents to said lands were erroneously issued to the Northern Pacific Railroad Company as a part of its land grant. It was prayed that the patents so erroneously issued be cancelled and set aside. An agreed statement of facts was entered into by the parties and filed in the suit on the 12th day of May, 1900. Said agreed statement was signed by John W. Griggs, Attorney-General of the United States. In said stipulation the parties agreed:

"That at all the times hereinafter mentioned the Northern Pacific Railroad Company was a corporation, organized, created, and existing under and by virtue of an act of Congress, approved July 2, 1864, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route.'

"That prior to the year 1875, the Northern Pacific Railroad Company completed the construction of that portion of its road extending from Kalama to Tacoma, upon the line of definite location thereof; and thereupon the President of the United States appointed commissioners to examine that portion of said road, and said commissioners duly reported that the same had been constructed in a good, substantial and workmanlike manner, in all respects as required by the act making the grant; and thereupon, to wit, on the first day of January 1875, the President of the United States approved the report of said commissioners and accepted said portion of said road, as required by the act making the grant.

"That thereafter said Northern Pacific Railroad Com-
285 pany completed the construction of that portion of said road extending from Kalama, in the then Territory of Washington, to the city of Portland, in the State of Oregon; that said portion of said road was constructed upon said line of definite location; and thereupon the President of the United States appointed commissioners to examine said portion of said road, and said commissioners duly reported that the same had been constructed in a good, substantial and workmanlike manner, in all respects, as required by the act making the grant; and thereupon, and on October 5, 1883, the President of the United States duly approved the report of said commissioners and accepted said portion of said road, as required by the act making the grant.

"That on or about the 23rd and 27th days of May 1895, the United States issued and delivered to the Northern Pacific Rail-

road Company letters patent, in due form of law, conveying to said Northern Pacific Railroad Company the legal title to all the lands described in the bill of complaint and involved in this suit.

"That the decree of the Circuit Court of the United States for the Eastern District of Wisconsin, and of the Circuit Court of the United States for the District of Washington, alleged in the bill and admitted in the answer thereto, was rendered in a suit of equity, instituted by the Farmer's Loan and Trust Company, for the purpose of foreclosing three certain mortgages, executed and delivered by the said Northern Pacific Railroad Company, upon certain property of said company, including the lands described in the bill of complaint, under said decree, and by virtue of certain deeds of conveyance, executed in pursuance of said decree, the Northern Pacific Railway Company acquired all the interest of the Northern Pacific Railroad Company in and to those lands described in the bill of complaint, which, at the date of said sale, were undisposed of by said Northern Pacific Railroad Company, by virtue of sales, contracts, and deeds as hereinafter set forth."

On the 1st day of August 1901, after trial and argument of said cause a decree was entered, ordering, adjudging, and decreeing that the bill of complaint of the complainant be dismissed for want of equity. Thereafter an appeal was taken by the United States to the Circuit Court of Appeals for the Ninth Circuit, which court certified to the Supreme Court of the United States certain questions on which it desired instructions. Thereafter the whole record and cause were required to be sent up to the United States Supreme Court for consideration, and in that court,
286 by a decision made on the 23rd day of February 1904, and reported in Volume 193 U. S. 1, the decree of the Circuit Court was affirmed. In said decision the court held:

"The line east of Portland provided for in the act of 1864 formed nearly a right angle at Portland with the line from there to Puget Sound provided for in the joint resolution, and thus the two grants overlapped, and the lands in suit fell within the overlap.

"But the line down the Columbia from Wallula to Portland was never built and the grant was forfeited September 29, 1890, 26 Stat. 496, c. 1040, while the line from Portland to Puget Sound and east across the Cascade Mountains was built and the grants earned" (p. 6).

47. On the 5th day of March 1907 the plaintiff herein filed in the Circuit Court of the United States for the Eastern District of Washington a bill of complaint signed by Charles J. Bona-

parte, Attorney General, entitled The United States of America, Complainant vs. Northern Pacific Railway Company et al., Defendants, wherein it was sought to cancel patents for lands issued to the Northern Pacific Railroad Company and the Northern Pacific Railway Company within the Yakima Indian Reservation upon the alleged erroneous and mistaken belief that said lands were included within the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, and were outside of said reservation. In said bill of complaint it was alleged:

"That said defendant, Northern Pacific Railway Company, did, on or about the 1st day of September 1896, by transfer and conveyance, become the successor in interest in and to all of the property, rights, and interests of the Northern Pacific Railroad Company, a corporation organized and existing under and by virtue of an Act of Congress passed July 2, 1864 (13 Stats. 365), and entitled, 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern route.' That the property rights and interests so transferred and conveyed by said last-named corporation to said defendant, Northern Pacific Railway Company, included all rights to the public lands granted, or to be granted, by the United States to said Northern Pacific Railroad Company under and by the terms of said Act of Congress, and, in terms, all lands for which patents had been theretofore issued to said corporation by the United States, said last mentioned lands being described in Exhibit 'A', hereto annexed, as having been patented prior to September 1, 1896."

287 In answer to said bill of complaint, defendant, Northern Pacific Railway Company, admitted that it became on or about the first day of September 1896, as alleged, successor in interest to all the property, rights, and interest of the Northern Pacific Railroad Company, a corporation under the Act of Congress of July 2, 1864; and that among said property and rights were the public lands granted and to be granted by the United States under the said Act of Congress and amendments thereto.

In the answer of the Northern Pacific Railroad Company it was admitted that defendant, Northern Pacific Railroad Company, was a corporation organized and existing under and by virtue of the Act of July 2, 1864. At the trial of said suit it was stipulated by the parties thereto:

"that the Northern Pacific Railroad Company was duly organized and created as a corporation on the 2d day of July 1864, by Act of Congress for the purpose of building and operating

a railroad through the states and territories lying between said points, including the territory of Washington. That the Northern Pacific Railway Company is the lawful successor in interest of the Northern Pacific Railroad Company."

On the 25th day of September 1909, a decree was entered in said suit cancelling said patents and holding that the United States was the owner of and entitled to the possession of the land covered by said patents subject to the rights of the Yakima Indians. Said case was subsequently appealed to the Circuit Court of Appeals of the Ninth Circuit and there affirmed. An appeal was taken from the decree of the Circuit Court of Appeals to the Supreme Court of the United States, and that court by decision dated February 24, 1913, reported in Volume 227 U. S., page 355, affirmed said decree. In its decision the Supreme Court held:

"There is no question made of the title of the railroad and railway companies or of their respective vendees other than as the lands fall within or without the reservation. If they were
288 within the boundaries of the reservation they were lands of the Indians; otherwise, public lands of the United States and passed to the companies, respectively, under the act of Congress and the patents issued in pursuance thereof" (p. 356).

48. On the 5th day of June 1915, plaintiff herein filed a bill of complaint in the District Court of the United States in and for the District of Montana, entitled, "United States of America, Complainant vs. Northern Pacific Railway Company, a corporation, Defendant," wherein it was sought to have cancelled certain patents to lands within the Gallatin Forest Reserve, which lands, it was alleged, were erroneously patented to the Northern Pacific Railway Company. In said bill of complaint plaintiff alleged:

"I

"That the defendant Northern Pacific Railway Company is now, and at all of the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin.

"II

"That the Northern Pacific Railroad Company was a corporation organized and existing under and by virtue of the Act of Congress of the United States, approved July 2, 1864, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route' (13 Stats. 365).

"III

"That the said defendant Northern Pacific Railway Company is the assignee and successor in interest of the said Northern Pacific Railroad Company, of, in and to all properties, lands, rights, grants, privileges, and franchises granted to said Northern Pacific Railroad Company by the aforesaid Act of Congress approved July 2, 1864, and by all acts supplemental thereto and amendatory thereof."

Defendant Northern Pacific Railway Company in its answer to said bill of complaint admitted that the defendant was a corporation and assignee and successor in interest of the Northern Pacific Railroad Company of, in and to all properties, lands, rights, grants, privileges, and franchises granted to the Northern Pacific Railroad Company by Act of Congress approved
289 July 2, 1864, as alleged in the bill. The cause came on for hearing on the bill of complaint, answer, and statement of agreed facts, and by decree entered on November 21, 1918, it was ordered, adjudged, and decreed that the bill of complaint be dismissed. An appeal was taken from said decree to the Circuit Court of Appeals of the Ninth Circuit, wherein said decree was affirmed. Subsequently an appeal was taken from the decree of the Circuit Court of Appeals to the Supreme Court of the United States. The decision of the Supreme Court is reported in 256 U. S., page 51. The court says:

"The lands in question are within the indemnity limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365, as modified and supplemented by the joint resolution of May 31, 1870, 16 Stat. 378, and were selected and patented as indemnity for lands lost within the place limits. The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other" (p. 58).

* * * * *

"The company duly accepted the terms of the grant, filed appropriate maps of the general route, afterwards definitely located the line in the mode prescribed, and constructed and completed the road from Ashland, Wisconsin, on Lake Superior, to Tacoma, Washington, on Puget Sound, and thence to Portland, Oregon, its full length, being more than 2,000 miles. The definite location was completed in 1884 and the construction in 1887. The road as completed was examined and favorably reported by the commissioners and accepted by the President. Reports of Com-

missioner of Railroads—for 1885, p. 22; 1886, p. 36; 1887, p. 24; 1888, p. 24; Doherty v. Northern Pacific Ry. Co., 177 U. S. 421; United States vs. Northern Pacific R. R. Co., 95 Fed. Rep. 864; s. c. 177 U. S. 435; United States v. Northern Pacific R. R. Co., 193 U. S. 1" (p. 60).

The court held that if there was a deficiency in the grant the Railway Company was entitled to a decree and remanded the case to the District Court with directions for further proceedings to determine that question.

49. This defendant further alleges that the interest or interests of this defendant in the property which is the subject matter of this suit exists or exist by virtue of the Prior Lien Mortgage, under which Northern Pacific Railway Company conveyed to this defendant as trustee thereunder all its right, title,
290 interest, and property in and to any and all lands granted by the Congress to aid in the construction of the railroad in said mortgage mentioned, and that by virtue of said mortgage there has been vested in this defendant not only a lien upon certain lands heretofore from time to time conveyed by the United States to Northern Pacific Railroad Company and/or Northern Pacific Railway Company (including lands so conveyed to Northern Pacific Railway Company after one or more of the judgments and decisions in the paragraphs numbered 45 to 48, inclusive, of this separate answer mentioned), but also a right that the lien of said mortgage should extend to lands from time to time hereafter conveyed by the United States to Northern Pacific Railway Company, and that, therefore, the judgments and decisions hereinabove in said paragraphs numbered 45 to 48, inclusive, of this separate answer referred to were rendered in litigation between the plaintiff herein and the predecessor or predecessors in interest of this defendant; and this defendant is advised and, therefore, further alleges that said judgments and decisions were and are binding upon this defendant, but only insofar as they relate to lands claimed by Northern Pacific Railway Company under the provisions of the Act of July 2, 1864, and/or the Joint Resolution of May 31, 1870, and not conveyed by the United States to Northern Pacific Railway Company prior to the respective dates of said decisions. This defendant further alleges that the several courts whose judgments and decisions are above referred to had jurisdiction over the parties to and the subject matter of said causes, and that said judgments and decisions, and all of them, were rendered on the merits and were final, and that no appeal is pending thereon, or upon any of them; and this defendant further alleges that by virtue of said judgments and decisions, or some of them, it has

291 been conclusively established as between the plaintiff herein and this defendant, and/or all holders of Prior Lien Bonds (1) that Northern Pacific Railroad Company was duly organized under the Act of July 2, 1864, (2) that Northern Pacific Railroad Company did build the railroad and telegraph line authorized by said Act and by the Joint Resolution of May 31, 1870, (3) that said railroad and telegraph line was accepted by the United States as provided in said Act of July 2, 1864, (4) that Northern Pacific Railroad Company did own and operate said railroad and telegraph line from its construction until the beginning of receivership proceedings in 1893, and (5) that Northern Pacific Railway Company is the successor in interest to Northern Pacific Railway Company by purchase at a valid foreclosure sale of said railroad and telegraph line and of the land grants made to Northern Pacific Railroad Company and of all other properties of Northern Pacific Railroad Company.

50. This defendant further alleges that in reliance upon some or all of the matters set forth in the paragraphs numbered 45 to 49, inclusive, of this separate answer, this defendant has continued to act as trustee under the Prior Lien Mortgage and many persons, members of the general public, from time to time have purchased and have continued to hold the Prior Lien Bonds, secured by the Prior Lien Mortgage, and that such persons now hold $107,399,600 principal amount of said bonds.

51. This defendant further alleges that the plaintiff herein is now estopped and barred from claiming as against this defendant and/or as against the holders of Prior Lien Bonds:—(1) That Northern Pacific Railroad Company was not duly organized under the Act of July 2, 1864, or (2) that Northern Pacific Railroad Company did not build the railroad and tele-

292 graph line authorized by said Act and by the Joint Resolution of May 31, 1870, or (3) that said railroad and telegraph line was not accepted by the United States as provided in said Act of July 2, 1864, or (4) that Northern Pacific Railroad Company did not own and operate said railroad and telegraph line from its construction until the beginning of the receivership proceedings in 1893, or (5) that Northern Pacific Railway Company is not the successor in interest to Northern Pacific Railroad Company by purchase at a valid foreclosure sale of said railroad and telegraph line and of the land grants made to Northern Pacific Railroad Company and of all other properties of Northern Pacific Railroad Company.

2. That the filing of this stipulation shall constitute a sufficient filing of said amendments subject to the approval and order of the Court with reference to the form and manner in which said

amendments shall be attached to or incorporated in said answer and the answer as thus amended shall constitute the answer of Defendant Bankers Trust Company herein.

3. That the order dated February 25, 1932, referring certain defenses, including the defense of res adjudicata in the answers of certain of the defendants, to Frank H. Graves, Esq., as Special Master, be deemed to include such twelfth separate and complete defense in the answer of Defendant Bankers Trust Company; that the report of the said Special Master filed May 31, 1933, be deemed to apply to and cover such twelfth separate and complete defense of Defendant Bankers Trust Company as though such defense had been included in the answer of Defendant Bankers Trust Company when the same was originally filed; and that the Exceptions of Defendant Bankers Trust Company filed July 20, 1933, and particularly Exception No. III
293 thereof be deemed to apply to the report of the Special Master upon said defense.

Dated January 10, 1934.

United States of America, Plaintiff, by Harry W. Blair, M, Assistant Attorney General; Roy C. Fox, by E. J. Farley, United States Attorney for the Eastern District of Washington, Northern Division; D. F. McGowan, Special Assistant to the Attorney General; E. E. Danly, Special Assistant to the Attorney General; Harry B. Fleharty; Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company, by Grafton Mason, E. J. Cannon, D. F. Lyons, D. R. Frost, Their Solicitors; Guaranty Trust Company, by Its Solicitors; Bankers Trust Company, by White & Case, E. J. Cannon, Its Solicitors; City Bank Farmers Trust Company, by Taylor, Blanc, Capron & Marsh, E. J. Cannon, Its Solicitors, Defendants.

[File endorsement omitted.]

294 In United States District Court

Order approving stipulation

Filed Jan. 11, 1934

The stipulation covering a certain amendment to answer of Defendant Bankers Trust Company in the above entitled action,

which said stipulation bears date of January 10, 1934, is hereby allowed and approved.

Dated at Spokane, Washington, this 11th day of January 1934.

J. STANLEY WEBSTER,
United States District Judge.

[File endorsement omitted.]

295 In United States District Court

[Title omitted.]

[File endorsement omitted.]

Separate answer of defendant, City Bank Farmers Trust Company

Filed Jan. 9, 1931

Now comes the defendant, City Bank Farmers Trust Company (formerly known as "The Farmers' Loan and Trust Company"), appearing herein by Taylor, Blanc, Capron & Marsh and E. J. Cannon, its solicitors, and, on information and belief, answers the bill of complaint herein as follows:

ANSWERING THE ALLEGATIONS OF SAID BILL OF COMPLAINT BUT WITHOUT WAIVING ANY DEFENSES IN POINT OF LAW HEREINAFTER IN THIS SEPARATE ANSWER SET FORTH

1. Answering the paragraph numbered I of said bill of complaint, this defendant admits that this suit arises under the laws of the United States and that the amount involved therein is in excess of $100,000. For the nature and purposes of the suit, this defendant refers to said bill of complaint.

2. Answering the paragraph numbered II of said bill of complaint, this defendant admits that Northern Pacific Railroad Company is a federal corporation organized and existing under the provisions of the Act of July 2, 1864; that Northern Pacific Railway Company is a corporation organized under the laws of the state of Wisconsin, having its general offices at St. Paul, Minnesota; that Bankers Trust Company and Guaranty Trust Company are corporations each organized and existing under the laws of the state of New York, each having its principal place of business in New York City; and that Bankers Trust Company claims an interest in the subject matter of this suit. This defendant further admits that it is a corporation organized
296 and existing under the laws of the state of New York, having its principal place of business in New York City, and

that it claims an interest in the subject matter of this suit; and it affirmatively alleges that this defendant is trustee under a certain indenture or deed of trust (hereinafter called the "General Lien Mortgage"), dated as of November 10, 1896, made by Northern Pacific Railway Company to this defendant as trustee under its then name of "The Farmers' Loan and Trust Company," securing the Railway Company's General Lien Railway and Land Grant Gold Bonds (hereinafter called the "General Lien Bonds") limited to an aggregate principal amount of $190,000,000 at any one time outstanding, of which bonds in the principal amount of $54,551,500 are presently outstanding. A copy of the General Lien Mortgage is annexed hereto as Exhibit 1 and made a part hereof. For a complete and accurate statement of the terms and provisions of said mortgage and the rights and duties of this defendant thereunder (including the interest or interests thereby granted and conveyed to or created in this defendant in and to the property or some of the property which is the subject matter of this suit) this defendant refers to the original of said mortgage, which this defendant offers to produce as and when this Court shall direct. Except as herein expressly admitted and/or alleged, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered II.

3. Answering the paragraph numbered III of said bill of complaint, this defendant admits that Congress adopted the Act of July 2, 1864, the Resolutions of May 7, 1866, July 1, 1868, March 1, 1869, and April 10, 1869, and the Joint Resolution of May 31, 1870, and that the quotations therefrom in said paragraph numbered III are substantially correct. As to the truth of the allegations with regard to the content and purport of said Act, Resolutions, and Joint Resolution, this defendant refers to said Act, Resolutions, and Joint Resolution for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes, and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said Act, Resolutions, and Joint Resolution, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered III.

4. Answering the paragraph numbered IV of said bill of complaint, this defendant alleges that the allegations of said paragraph numbered IV are conclusions of law. As to the truth of the allegations with regard to the content and purport of the Act of July 2, 1864, this defendant refers to said Act for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes, and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said

Act, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered IV.

5. Answering the paragraph numbered V of said bill of complaint, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered V.

6 and 7. Answering the paragraphs numbered VI and VII of said bill of complaint, as to the truth of the allegations with regard to the content and purport of the Act of July 2, 1864, this defendant refers to said Act for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes, and effect thereof. Except as to the truth of the allega-
297 tions with regard to the content and purport of said Act, this defendant has no knowledge as to the truth of any allegation contained in said paragraphs numbered VI and VII.

8 and 9. Answering the paragraphs numbered VIII and IX of said bill of complaint, this defendant admits that the quotation from the Act of July 2, 1864, in said paragraph numbered VIII is substantially correct. As to the truth of the allegations with regard to the content and purport of said Act and the Joint Resolution of May 31, 1870, this defendant refers to said Act and Joint Resolution for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes, and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said Act and Joint Resolution, this defendant has no knowledge as to the truth of any allegation contained in said paragraphs numbered VIII and IX.

10. Answering the paragraph numbered X of said bill of complaint, this defendant admits that subsequent to August 12, 1875, the Northern Pacific Railroad Company issued certain mortgages, subsequently referred to in said bill of complaint, that certain of said mortgages were foreclosed in certain proceedings initiated in 1893 in the Circuit Court of the United States for the Eastern District of Wisconsin, and that, as a consequence of said foreclosures and other proceedings collateral thereto, Northern Pacific Railway Company, one of the defendants named in this action, succeeded to, by operation of law or otherwise, such rights, titles, and interests either in law or in equity as were then held by the Northern Pacific Railroad Company. As to the truth of the allegations with regard to the content and purport of the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, this defendant refers to said Act and Joint Resolution for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes, and effect thereof. Except as herein expressly admitted and except as to the truth of the allegations with regard to the content and purport of said

Act and Joint Resolution, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered X.

11. Answering the paragraph numbered XI of said bill of complaint, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered XI.

12 and 13. Answering the paragraphs numbered XII and XIII of said bill of complaint, as to the truth of the allegation with regard to the content and purport of the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, this defendant refers to said Act and Joint Resolution for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes, and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said Act and Joint Resolution, this defendant has no knowledge as to the truth of any allegation contained in said paragraphs numbered XII and XIII.

14. Answering the paragraph numbered XIV of said bill of complaint, this defendant admits that by the provisions of the Northern Pacific Railroad Company Consolidated Mortgage dated December 2, 1889, subsequently in said bill of complaint and in this answer referred to, $26,000,000 principal amount of bonds issued thereunder were reserved to be issued from time to time as the Railroad Company should acquire either (a) certain lines of railroad, free from mortgage, of companies specifically named in said Consolidated Mortgage (which lines are de-
298 scribed therein as "tributary to the said main line or Cascade Branch of the Railroad Company" and as having "connected said roads with the said main line or Cascade Branch, or with roads now being operated by the Railroad Company under the leases and traffic contracts hereinafter mentioned as a part of its railroad system"), or (b) the mortgage bonds which then constituted a first lien on said lines of railroad; and further admits that certain bonds so reserved under said Consolidated Mortgage were issued in accordance with said provisions. As to the truth of the allegations with regard to the content and purport of said Consolidated Mortgage, the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, this defendant refers to the original of said Consolidated Mortgage (which, or a duly certified copy whereof, this defendant calls upon the plaintiff to produce at the trial of this cause) and to said Act and Joint Resolution for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes, and effect thereof, and the property and interests therein by said mortgage granted and

conveyed. Except as herein expressly admitted and except as to the truth of the allegations with regard to the content and purport of said Consolidated Mortgage, Act, and Joint Resolution, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered XIV.

15. Answering the paragraph numbered XV of said bill of complaint, as to the truth of the allegations with regard to the content and purport of the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, this defendant refers to said Act and Joint Resolution for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes, and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said Act and Joint Resolution, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered XV.

16. Answering the paragraph numbered XVI of said bill of complaint, this defendant admits and affirmatively alleges that subsequent to June 30, 1875, Northern Pacific Railroad Company executed five certain mortgages to this defendant, under its then name of "The Farmers' Loan and Trust Company," which mortgages with their respective dates, designations, and aggregate principal amounts of bonds authorized thereunder are, respectively, as follows:

Date	Designation	Amount of bonds authorized
May 1, 1879	First Mortgage, Missouri Division	$2,500,000
September 1, 1879	First Mortgage, Pend d'Oreille Division	4,500,000
November 20, 1883	General Second Mortgage	20,000,000
December 1, 1887	General Third Mortgage	12,000,000
December 2, 1889	Consolidated Mortgage	100,000,000

and this defendant admits that the copies of said mortgages annexed to said bill of complaint as exhibits G, H, J, K, and L thereto, respectively, are substantially correct copies thereof; this defendant alleges, however, that certain errors, inaccuracies, and/or omissions exist in said exhibits G, H, J, K, and L attached to said bill of complaint, all as more fully set out in a certain schedule annexed to this separate answer as Ex-
299 hibit 2 hereto and made a part hereof; this defendant admits that Northern Pacific Railroad Company under date of January 1, 1881, executed to Central Trust Company of New York City as trustee its General First Mortgage providing for the issuance of bonds to be secured thereunder in an aggregate principal amount equal to $25,000 per mile of railroad; this

defendant further alleges that the originals of said mortgages were thereafter filed with the Department of the Interior, and for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes, and effect of said mortgages, and the property and interests therein by said mortgages granted and conveyed, this defendant refers to said originals of said mortgages, filed with the Department of the Interior (which, or duly certified copies whereof, this defendant calls upon the plaintiff to produce at the trial of this cause). Except as herein expressly admitted and/or alleged, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered XVI.

17. Answering the paragraph numbered XVII of said bill of complaint, this defendant admits and affirmatively alleges that subsequent to July 4, 1879, with moneys received from the sale of bonds issued under certain of the mortgages referred to in paragraph 16 of this answer, i. e., under the First Mortgage Missouri Division, First Mortgage Pend d'Oreille Division, General Second Mortgage and General Third Mortgage, and with moneys otherwise received, a main line railroad from Bismarck, North Dakota, to Wallula, Washington, and from Portland, Oregon, to a point in Oregon opposite Kalama, Washington, from Thompson Junction, Minnesota, to Ashland, Wisconsin, and a branch line railroad from Tacoma, Washington, to Pasco, Washington, were constructed. Except as herein expressly admitted, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered XVII.

18. Answering the paragraph numbered XVIII of said bill of complaint, this defendant admits and affirmatively alleges that on or about August 15, 1893, P. B. Winston, this defendant (under its then name of "The Farmers' Loan and Trust Company") and George R. Sheldon, William C. Sheldon, William S. P. Prentice, and William C. Sheldon, Jr. (comprising the firm of William C. Sheldon & Co.), as complainants, filed their bill of complaint (hereinafter called "said creditors' bill"), verified August 14, 1893, against Northern Pacific Railroad Company, as defendant, in the Circuit Court of the United States for the Eastern District of Wisconsin; that by said creditors' bill it was alleged that the Railroad Company's books indicated a net deficit for the fiscal year ending June 30, 1893, that the Railroad Company's gross earnings were steadily decreasing and that certain defaults by the Railroad Company were impending and inevitable; and that said creditors' bill prayed for the appointment of receivers. This defendant further admits that by an order

entered on or about August 15, 1893, said Circuit Court of the United States appointed Henry C. Payne, Thomas F. Oakes, and Henry C. Rouse, receivers for said Railroad Company and said receivers immediately thereafter qualified as such and took possession of the property of said Railroad Company. This defendant further affirmatively alleges that creditors' bills, similar to the creditors' bill above referred to and ancillary thereto, were filed in various circuit courts of the United States
300 and orders were entered in said courts appointing the same receivers as were appointed by said court for the Eastern District of Wisconsin on the dates hereinafter set forth, respectively, viz:

Circuit Court of the United States for—	Date of verification of creditors' bill	Date of court's order thereon
Southern District of New York	August 15, 1893	August 16, 1893.
Northern District of Illinois	August 15, 1893	August 16, 1893.
Western District of Wisconsin	August 15, 1893	August 15, 1893.
Western District of Michigan	August 16, 1893	August 24, 1893.
District of Minnesota	August 15, 1893	August 15, 1893. August 24, 1893.[1]
District of North Dakota	August 15, 1893	August 15, 1893. August 19, 1893.[1]
District of Montana	August 15 and 16, 1893	August 16, 1893.
District of Idaho	August 15 and 18, 1893	August 18, 1893.
District of Washington	August 15 and 17, 1893	August 17, 1893. August 26, 1893.[1]
District of Oregon	August 15 and 17, 1893	August 17, 1893. [1]August 22, 1893.

[1] Amended order.

This defendant further admits and affirmatively alleges that on or about October 18, 1893, this defendant (under its then name of "The Farmers' Loan and Trust Company"), as complainant, filed its bill of complaint (hereinafter called "said foreclosure bill") verified October 16, 1893, against Northern Pacific Railroad Company, Phillips B. Winston, and William C. Sheldon, George R. Sheldon, William S. P. Prentice, and William C. Sheldon, Jr. (comprising the firm of William C. Sheldon & Co.), and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Railroad Company, as defendants, in the Circuit Court of the United States for the Eastern District of Wisconsin; that by said foreclosure bill it was alleged that bonds of the Railroad Company were issued and outstanding under its General Second Mortgage, General Third Mortgage and Consolidated Mortgage (hereinabove described in paragraph 16 of this separate answer) in the respective aggregate principal amounts of $19,216,000, $11,461,000, and $62,443,000, and that default had been made by the defendant, Northern Pacific Rail-

road Company, in the performance of certain of its covenants contained in said mortgages, including default in the payment of interest upon bonds issued and outstanding under said General Second Mortgage and said Consolidated Mortgage; and this defendant further admits and affirmatively alleges that said foreclosure bill prayed for the appointment of a receiver or receivers, with the usual powers, to operate the mortgaged property pending a judicial sale thereof and prayed further for an adjudication as to the respective liens of said mortgages and for other relief.

This defendant further admits and affirmatively alleges
301 that by an order of said court made in said causes and dated October 18, 1893, said foreclosure cause was consolidated with said creditors' cause above referred to and the receivers appointed in said creditors' cause were appointed receivers in the consolidated cause. This defendant further admits and affirmatively alleges that on or about December 8, 1893, this defendant, as complainant, filed its amended and supplemental bill of complaint, verified December 5, 1893, against the same defendants and in the same court; and that by said amended and supplemental foreclosure bill it was alleged that further default had been made by the defendant, Northern Pacific Railroad Company, in the performance of its covenants under the General Third Mortgage by default in the payment of interest upon the bonds issued and outstanding under said General Third Mortgage. This defendant further alleges that on or about February 10, 1896, this defendant, as complainant, filed its second and amended supplemental bill of complaint, verified February 7, 1896, against the same defendants and in the same court; and that by said second and amended supplemental bill of complaint it was alleged that further default had been made by the defendant, Northern Pacific Railroad Company, in the performance of its covenants under said General Second Mortgage, General Third Mortgage, and Consolidated Mortgage, by default in the payment of interest upon the bonds issued and outstanding thereunder and it was further alleged therein that this defendant as trustee under said mortgages had elected pursuant to the provisions of said mortgages that the whole principal sum mentioned in each and all of the bonds secured by said mortgages should forthwith become due and payable and it was further alleged therein that said whole of said principal sum was then due and payable and unpaid. This defendant further affirmatively alleges that foreclosure bills similar to the foreclosure bill above referred to and ancillary thereto were filed in various circuit courts of the United States and orders were entered in said courts on the dates hereinafter set forth, respectively, viz:

Circuit Court of the United States for—	Date of verification of foreclosure bill	Date of filing of foreclosure bill	Date of court's order consolidating causes and appointing receivers thereon
Southern District of New York	October 18, 1893.	August 5, 1895	February 21, 1896.
Western District of Wisconsin	October 18, 1893.	October 25, 1893	October 25, 1893.
District of Minnesota	October 18, 1893.	November 14, 1893	[1] November 14, 1893.
District of North Dakota	October 18, 1893.	October 25, 1893	October 25, 1893.
District of Montana	October 18, 1893.	October 30, 1893	[2] October 30, 1893. [3] November 7, 1893.
District of Idaho	October 18, 1893.	November 1, 1893	November 14, 1893.
District of Washington	October 28, 1893.	October 30, 1893	October 30, 1893.
District of Oregon	October 18, 1893.	October 28, 1893	October 28, 1893.

[1] Appointing receivers but not consolidating causes.
[2] Appointing receivers.
[3] Consolidating causes.

302 This defendant further affirmatively alleges that, subsequent to the filing of said creditors' bill and said foreclosure bill and on or about February 19, 1894, a bondholders' agreement was executed under which Mercantile Trust Company was appointed depositary and under which a reorganization committee was created, of which Edward D. Adams was chairman; that bonds of the Northern Pacific Railroad Company secured by its General Second Mortgage, its General Third Mortgage, and its Consolidated Mortgage were deposited under said bondholders' agreement; that thereafter and under date of July 10, 1894, a certain other bondholders' agreement for holders of General Second Mortgage bonds was entered into under which New York Security and Trust Company was appointed depositary and by which a reorganization committee was constituted, of which Johnston Livingston was chairman; that thereafter and under date of August 15, 1894, a certain other bondholders' agreement for holders of General Third Mortgage bonds was entered into under which New York Guaranty and Indemnity Company was appointed depositary and by which a protective committee was appointed of which Charles B. Van Nostrand and Evans R. Dick were members; and that thereafter and on or about February 21, 1895, an order was entered by the Circuit Court of the United States for the Eastern District of Wisconsin in the consolidated cause above referred to granting the prayers of intervening petitions presented on behalf of said three committees "so far as to permit" members of each of said committees "to be made parties defendant * * * for the purpose of protecting the interests of the bonds represented by their committees respectively, in any conflict which may arise as to their respective interests in the estate". This defendant further alleges that it appears from the case of Pearsall v. Great Northern Railway Company, 161 U. S. 646, referred to in the paragraph numbered XVIII of said bill of complaint, that the reor-

ganization committee appointed under said bondholders' agreement dated February 19, 1894, subsequently entered into an agreement with Great Northern Railway, a Minnesota corporation, for the reorganization of the Northern Pacific Railroad Company; that Pearsall, a minority stockholder of Great Northern Railway, brought a bill in equity to enjoin Great Northern Railway from entering into and carrying out said agreement on the ground that it violated certain Minnesota statutes; and that the United States Supreme Court sustained the position taken by said minority stockholder.

This defendant further alleges that under date of March 16, 1896, a certain other plan for the reorganization of Northern Pacific Railroad Company was put forward by said reorganization committee (i. e., the committee appointed under said bondholders' agreement dated February 19, 1894) and by a certain protective committee (representing stockholders), of which Brayton Ives was chairman; that on the same date, a reorganization agreement was entered into by and between said reorganization committee, the Mercantile Trust Company, J. P. Morgan & Company, Deutsche Bank, said protective committee, and such holders of the following securities as might becomes parties to such reorganization agreement, viz:

Mortgage bonds of Northern Pacific Railroad Company; Certificates of deposit issued by the Mercantile Trust Company for bonds secured by the General Second Mortgage, General Third Mortgage and Consolidated Mortgage; Collateral trust notes and dividend certificates of Northern Pacific Railroad Company; Mortgage bonds of various branch railroads; Preferred and common stock of Northern Pacific Railroad Company; and this defendant admits that a correct copy of said plan and of said reorganization agreement is set forth in exhibit M attached to said bill of complaint.

This defendant further alleges that on or about April 27, 1896, a final decree of foreclosure and sale in this separate answer sometimes referred to as "said final decree" was entered by the Circuit Court of the United States for the Eastern District of Wisconsin in the consolidated cause hereinabove in this paragraph referred to, by which said final decree said court adjudged the lawful execution of the six mortgages referred to in the paragraph numbered 16 of this separate answer and the creation of liens thereby upon the property of the Railroad Company as follows: (a) by said First Mortgage Missouri Division, as security for the bonds issued thereunder, a lien in favor of this defendant as trustee on all that part of the Railroad Company's main line known as its Missouri Division, extending from the Missouri River in North Dakota to the Yellowstone River in

Montana, together with all lands (including interests and rights in and to lands) granted by Congress pertaining thereto and certain other property; (b) by said First Mortgage Pend d'Oreille Division, as security for the bonds issued thereunder, a lien in favor of this defendant as trustee on all that part of the Railroad Company's main line of railroad known as its Pend d'Oreille Division, extending from the Snake River in Washington to Lake Pend d'Oreille in Idaho, together with all lands (including interests and rights in and to lands) granted by Congress pertaining thereto and certain other property; (c) by said General First Mortgage, as security for the bonds issued thereunder, a lien in favor of Central Trust Company of New York as trustee on the Railroad Company's main line of railroad and its Cascade Branch together with certain lands (including interests and rights in and to lands) granted to it by Congress and certain other property; (d) by said General Second Mortgage, as security for the bonds issued thereunder, a lien in favor of this defendant as trustee on the Railroad Company's lines of railroad from Lake Superior to Puget Sound and from Portland to Tacoma and its Cascade Branch together with all lands (including interests and rights in and to lands) granted by Congress pertaining to such entire main line and to said branch (except lands in Minnesota and in North Dakota east of the Missouri River); (e) by said General Third Mortgage, as security for the bonds issued thereunder, a lien in favor of this defendant as trustee on the same property as was covered by the General Second Mortgage (with certain exceptions and with the addition of the right, title, and interest of the Railroad Company, by virtue of leases or otherwise, in and to certain branch lines); (f) by said Consolidated Mortgage, as security for the bonds issued thereunder, a lien in favor of this defendant as trustee on the same property as was covered by the General Second Mortgage (with certain exceptions and with the addition of certain stocks and bonds). This defendant further alleges that by said final decree the court also found that the Railroad Company was in default under its General Second Mortgage, General Third Mortgage and Consolidated Mortgage; that the
304 sums of $23,033,738.80, $13,606,212.70 and $71,643,703.63, respectively, were then due and payable upon the bonds secured by said mortgages, respectively; and that, in addition to said sums, the Railroad Company was indebted in other large sums and had made default in the payment thereof and was unable to pay the same and was wholly insolvent. This defendant further alleges that the court directed in said final decree that all of the property covered by the General Second Mortgage, other than the lands (including interests and rights in and to

lands) granted by Congress, be sold in one parcel; that the stocks and bonds upon which the Consolidated Mortgage had been found to be a first lien should be sold as a second separate parcel and that certain leases and other interests in and to certain branch lines specifically mentioned in the General Third Mortgage be sold as a third separate parcel. Under date of April 28, 1896, a supplemental decree was entered by said court in said consolidated cause providing for the sale on sixty days' notice of all of the lands granted by Congress and all of the rights of the Railroad Company under the several land grants made to it by Congress (except lands and/or rights in or to lands in Minnesota or North Dakota east of the Missouri River). As to the lands for which letters patent had been issued and also as to the right to receive lands for which letters patent had not been issued but which had been selected by and certified to the Railroad Company, it was provided that the sale should be in single sections or subdivisions thereof; as to all lands for which letters patent had not been issued and which had not been selected by and certified to the Railroad Company but to which the Railroad Company was entitled and as to all other rights of the Railroad Company in connection with the land grant lands, it was provided that the sale should be made in parcels, each single parcel to include all such lands and rights located in any one state. By said final decree and said supplemental decree it was provided that all property sold pursuant thereto should be sold subject to such liens as then existed in favor of the First Mortgage Missouri Division, the First Mortgage Pend d'Oreille Division and the General First Mortgage.

This defendant further alleges that subsequently an order was entered by said court in said consolidated cause approving the form of notice of sale and thereafter and on or about July 25, 1896, the sale provided for in said final decree was held and the property sold to Northern Pacific Railway Company, a Wisconsin corporation, one of the defendants herein, and such sale was confirmed by order of said court entered in said consolidated cause under date of July 27, 1896. Subsequently, pursuant to the provisions of the supplemental decree dated April 28, 1896, separate sales of lands and rights to lands were held in the several states in which said lands and rights were located and at these sales also said Northern Pacific Railway Company was purchaser. The special master appointed for the purpose of conducting the sales made a report or reports to the Circuit Court of the United States in each district in which ancillary proceedings were pending of all sales of lands and/or rights in and to lands made in that district and said reports were approved by said respective courts. On or about August 8, 1896, the special master filed in

said Circuit Court for the Eastern District of Wisconsin in said consolidated cause a report of the sale of said lands and/or rights in and to lands located in Wisconsin together with the reports of sales of such lands and/or rights in and to lands in other states,
and under date of August 8, 1896, said court entered an
305 order in said consolidated cause confirming all of said sales
of lands and/or rights in and to lands. Similar orders were entered in the respective ancillary causes confirming sales made within the respective jurisdictions of the several courts. Thereafter, pursuant to said final decree, as supplemented and amended as aforesaid, deeds were executed and delivered to the Northern Pacific Railway Company conveying to said Northern Pacific Railway Company the railroad and land grant lands and rights in and to lands and all other properties formerly owned by the Northern Pacific Railroad Company (with the exception of land grant lands and rights in Minnesota and North Dakota east of the Missouri River). These deeds were made, respectively, by the special master, Northern Pacific Railroad Company, the trustees of the mortgages that were foreclosed, and the receivers.

This defendant further alleges that by petition filed September 25, 1897, in said consolidated cause addressed to the Circuit Court of the United States for the Eastern District of Wisconsin, the receivers petitioned said court for authority and direction to sell certain unsold lands and land contracts and any other remaining assets of Northern Pacific Railroad Company at public auction to the highest and best bidder. On April 27, 1899, an order was made by said court authorizing and directing that such sale be made by the special master. On May 25, 1899, said order was amended, and subsequently said special master, pursuant to said amended order, sold said lands and duly reported the sales to said court. The Northern Pacific Railway Company was the purchaser of the lands and rights to lands so sold by the special master. On September 16, 1899, said court entered a decree confirming the special master's report of sales and in this decree provided that deeds to the lands sold should be made by the special master, by the receivers, and by Northern Pacific Railroad Company. These deeds were duly made.

This defendant further admits that the United States was not a party to said consolidated cause or to any of the proceedings had in connection therewith; that the quotation from the Joint Resolution of May 31, 1870, in said paragraph numbered XVIII is substantially correct; that on April 28, 1896, said General Second Mortgage, General Third Mortgage, and Consolidated Mortgage, covered all of the lands and interests in and to lands granted by Congress to Northern Pacific Railroad Company by

the Act of July 2, 1864, and by the Joint Resolution of May 31, 1870, and which were on that date still owned by said Railroad Company except those lands and interests in lands situated in Minnesota and in North Dakota east of the Missouri River. This defendant further admits and affirmatively alleges that Northern Pacific Railway Company, the purchaser at the sales hereinabove referred to, subjected the properties acquired by it at said foreclosure sales, including all lands and interests in and to lands granted to Northern Pacific Railroad Company by the United States, to its Prior Lien Mortgage and its General Lien Mortgage. This defendant denies that either the plan of reorganization dated March 16, 1896, and hereinabove referred to, or any of the proceedings in said consolidated cause, was or were collusive or fraudulent against the United States or in violation of any of the provisions of the Act of July 2, 1864, or the Joint Resolution of May 31, 1870. This defendant refers to said Act of July 2, 1864, and to said Joint Resolution of May 31,
306 1870, for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes, and effect thereof. Except as herein expressly admitted and/or alleged, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered XVIII.

19. Answering the paragraph numbered XIX of said bill of complaint, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered XIX.

20. Answering the paragraph numbered XX of said bill of complaint, this defendant admits that the Supreme Court of the United States decided the case of United States v. Northern Pacific Railway Company, reported in 256 U. S. 51, on April 11, 1921, and that Congress adopted the Joint Resolution of June 5, 1924. As to the truth of the allegations with regard to the content and purport of said decision of the Supreme Court, the Act of July 2, 1864, and the Joint Resolutions of May 31, 1870, and June 5, 1924, this defendant refers to said decision, Act and Joint Resolutions for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said decision, Act and Joint Resolutions, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered XX.

21. Answering the paragraph numbered XXI of said bill of complaint, as to the truth of the allegations with regard to the content and purport of the Acts of July 2, 1864, and June 25, 1929, and the Joint Resolution of May 31, 1870, this defendant refers to said Acts and Joint Resolution for a complete and ac-

curate statement of the recitals, provisions, terms, conditions, purposes and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said Acts and Joint Resolution, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered XXI.

22 to 25, inclusive. Answering the paragraphs numbered XXII to XXV, inclusive, of said bill of complaint, this defendant has no knowledge as to the truth of any allegation contained in said paragraphs numbered XXII to XXV, inclusive.

26. Answering the paragraph numbered XXVI of said bill of complaint, as to the truth of the allegations with regard to the content and purport of the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, this defendant refers to said Act and Joint Resolution for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said Act and Joint Resolution, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered XXVI.

27. Answering the paragraph numbered XXVII of said bill of complaint, this defendant admits that the quotation from the Act of September 29, 1890, in said paragraph numbered XXVII is substantially correct. As to the truth of the allegations with regard to the content and purport of said Act and of the Acts of July 1, 1898, and May 17, 1906, this defendant refers to said Acts for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said Acts, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered XXVII.

307 28. Answering the paragraph numbered XXVIII of said bill of complaint, this defendant admits that subsequent to the decision, made May 26, 1894, by the Supreme Court of the United States in the case of Barden v. Northern Pacific Railway Company, reported at 154 U. S. 288, Congress passed the Act of February 26, 1895. As to the truth of the allegations with regard to the content and purport of said decision and Act and of the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, this defendant refers to said decision, Acts, and Joint Resolution for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said decision, Acts and Joint Resolution, this de-

fendant has no knowledge as to the truth of any allegation contained in said paragraph numbered XXVIII.

29. Answering the paragraph numbered XXIX of said bill of complaint, as to the truth of the allegations with regard to the content and purport of the treaties dated September 17, 1851, October 17, 1855 and May 7, 1868, between the United States and certain Indian tribes, this defendant refers to said treaties (which, or duly certified copies whereof, this defendant calls upon the plaintiff to produce on the trial of this cause) for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said treaties, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered XXIX.

30 to 35, inclusive. Answering the paragraphs numbered XXX to XXXV, inclusive, of said bill of complaint, this defendant admits that the quotation from the Joint Resolution of May 31, 1870, contained in the paragraph numbered XXXIII of said bill of complaint is correctly set forth. As to the truth of the allegations with regard to the content and purport of the Act of July 2, 1864, and said Joint Resolution, this defendant refers to said Act and Joint Resolution for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said Act and Joint Resolution, this defendant has no knowledge as to the truth of any allegation contained in said paragraphs numbered XXX to XXXV, inclusive.

36. Answering the paragraph numbered XXXVI of said bill of complaint, as to the truth of the allegations with regard to the content and purport of the Acts of July 2, 1864, July 22, 1866, July 25, 1866, July 1, 1898, March 2, 1899 and June 9, 1916, and the Joint Resolution of May 31, 1870, this defendant refers to said Acts and Joint Resolutions for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said Acts and Joint Resolution, this defendant has no knowledge as to the truth of any allegation contained in said paragraph numbered XXXVI.

37 and 38. Answering the paragraphs numbered XXXVII and XXXVIII of said bill of complaint, this defendant affirmatively alleges that Northern Pacific Railway Company by its General Lien Mortgage duly conveyed to this defendant as trustee as security for the General Lien Bonds to be issued thereunder

all of the Railway Company's right, title, and interest to
308 certain property in said mortgage set forth, including all property (inter alia, all lands and/or interests in lands) granted to it by Congress; that the General Lien Mortgage has been duly recorded in all offices in which it is, or was, required by law to be recorded in order that it should become a valid lien against all persons, including the plaintiff herein, upon said lands or interests in lands granted by Congress; and that this defendant, as a result of such conveyance to it, is an "innocent purchaser for value" within the meaning of the provisions of the Act of June 25, 1929. As to the truth of the allegations in said paragraphs numbered XXXVII and XXXVIII with regard to the content and purport of said Act, this defendant refers to said Act for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said Act, this defendant has no knowledge as to the truth of any allegation contained in said paragraphs numbered XXXVII and XXXVIII.

39 to 41 inclusive. Answering the paragraphs numbered XXXIX to XLI, inclusive, of said bill of complaint, this defendant has no knowledge as to the truth of any allegation contained in said paragraphs numbered XXXIX to XLI, inclusive.

42. Answering the paragraph numbered XLII of said bill of complaint, this defendant denies that the plaintiff is entitled to any relief against this defendant.

FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR A FIRST, SEPARATE AND DISTINCT DEFENSE IN POINT OF LAW ARISING UPON THE FACE THEREOF

43. This defendant alleges that it appears from the face of said bill of complaint that the plaintiff herein is guilty of gross laches, in that it appears from the face of said bill of complaint (a) that most of the acts complained of took place between the years 1864 and 1899, or from 34 to 66 years before the institution of this suit; (b) that many and divers persons have acquired stock in Northern Pacific Railway Company and bonds issued under said Railway Company's Prior Lien Mortgage and General Lien Mortgage, to the liens of which were subjected all of the lands granted by the United States; (c) that said stock and said bonds were acquired upon the faith of the validity of the title and/or claim of Northern Pacific Railway Company in and to said lands; (d) that said bonds were acquired upon the faith of the validity of the lien of said mortgages respectively; and (e) that the

plaintiff herein has long had knowledge of the material facts set forth in said bill of complaint.

FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR A SECOND, SEPARATE AND DISTINCT DEFENSE IN POINT OF LAW ARISING UPON THE FACE THEREOF

44. This defendant alleges that it appears from the fact of said bill of complaint that the causes of complaint are stale and that so long a time has passed since the matters and things complained of took place that it would be contrary to equity and good conscience for this court to take cognizance thereof.

309 FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR A THIRD, SEPARATE AND DISTINCT DEFENCE

45. This defendant alleges that it appears from the face of said bill of complaint that, in so far as said bill of complaint states a cause of action for the recovery of lands patented by the United States and/or for the cancellation, vacation or annulment of any such patent wherein the patent attacked was issued more than six years prior to the institution of this suit, the plaintiff is barred from bringing such cause of action by the provisions of the statutes of the United States relating thereto, including the Act of March 2, 1896, ch. 39, sec. 1; 29 Stat. 42; U. S. C. A., title 43, sec. 900.

FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR A FOURTH, SEPARATE AND DISTINCT DEFENCE

46. This defendant admits that it claims an interest in the subject matter of this suit and affirmatively alleges that such interest arises through its being trustee under defendant Northern Pacific Railway Company's General Lien Mortgage, referred to in the paragraph numbered XVIII of said bill of complaint; and this defendant further affirmatively alleges that said bill of complaint fails to state facts sufficient to constitute a cause of action in equity in favor of the plaintiff and against this defendant either severally or jointly with the other defendants, save that cause of action (if any) stated in the paragraphs of said bill of complaint numbered I, II, III, V, XVII, XX, XXI and XXXVII, that portion of the paragraph thereof numbered IX beginning on page 14 at line 31 and continuing through line 13 on page 15, and that portion of the paragraph thereof numbered X beginning on page 23 at line 17 and (omitting the words "hereinafter referred to" in lines 20–21 and the words "as more

fully hereinafter set forth" in lines 23–24 on said page 23) continuing through line 2 on page 24, being the cause of action (if any) for which relief is prayed in that portion of the prayers of said bill of complaint beginning on page 97 at line 10 and continuing through line 5 on page 98.

FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR A FIFTH, SEPARATE AND DISTINCT DEFENSE

47. This defendant admits that it claims an interest in the subject matter of this suit, and affirmatively alleges that such interest arises through its being trustee under defendant Northern Pacific Railway Company's General Lien Mortgage referred to in the paragraph numbered XVIII of said bill of complaint; and this defendant further affirmatively alleges that all of the paragraphs of said bill of complaint numbered IV, VI to VIII, X to XVI, XVIII, XIX, XXII to XXXVI, and XXXVIII to XLI, all numbers inclusive, those portions of the paragraph thereof numbered IX beginning on page 14 at line 12 and continuing through line 30 on said page and beginning on page 15 at line 14 and continuing through line 18 on page 22, and that portion of the paragraph thereof numbered X beginning on page 22 at line 20 and continuing through line 16 on page 23 (together with the words "hereinafter referred to" in lines 20–21 and the words "as more fully hereinafter set forth" in lines 23–24 on said page 23), are impertinent and wholly irrelevant to the cause or causes of action undertaken to be alleged in said bill of complaint.

310 FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR A SIXTH, SEPARATE AND DISTINCT DEFENSE

48. This defendant realleges each and every allegation contained in paragraphs 43 and 44 of this separate answer and further alleges that plaintiff has had notice of most of said matters complained of for upwards of thirty years and of many of said matters for more than fifty years; that all persons having actual knowledge of the facts alleged in the paragraphs numbered VI to XVII, inclusive, of said bill of complaint are now dead; and that this defendant has been damaged by such laches of the plaintiff.

FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR A SEVENTH, SEPARATE AND DISTINCT DEFENSE

49. This defendant realleges each and every allegation contained in the paragraph numbered 2 of this separate answer re-

lating to the execution and delivery of the General Lien Mortgage and the authentication and issuance of the General Lien Bonds; and alleges that the General Lien Mortgage (annexed hereto as Exhibit 1) contains, among its preambles, the following recital:

"Whereas, pursuant to certain decrees made and entered by the United States Circuit Court for the Eastern District of Wisconsin in a certain cause therein pending, wherein The Farmers' Loan and Trust Company and others were complainants and the Northern Pacific Railroad Company and others were defendants, and to certain other decrees made and entered by the United States Circuit Courts for various other Districts in certain ancillary causes therein pending between the above-named parties, the railroad and telegraph lines, property and franchises of the Northern Pacific Railroad Company, a corporation organized under an Act of Congress of the United States, to construct a Railroad and Telegraph Line from a point on Lake Superior in the State of Wisconsin, or the State of Minnesota, to Puget's Sound on the Pacific Coast by the northern route, including the branch from a point on said lines across the Cascade Mountains to Puget's Sound, and also certain lands granted by the Congress of the United States to aid in the construction and equipment of the main line and branch of said Company, and, also, the rights of said company under such grants made by Congress, and also certain shares of stock and bonds of other companies, and certain other properties—were sold to the Railway Company, party of the first part hereto, by Alfred L. Cary, the Special Master appointed by said Courts to make such sale.

And whereas, in said causes pending in said several courts such further proceedings were had that the sales of said properties were duly confirmed and said railroad and telegraph lines, franchises, lands and rights to lands, stocks, bonds and other properties were conveyed and assigned to the Railway Company, party of the first part hereto, in pursuance of the said decrees and of the orders of said courts made thereon;"

50. This defendant alleges that, in joining in the execution and delivery of the General Lien Mortgage and in authenticating the General Lien Bonds issued thereunder, it acted in
311 reliance upon the above-quoted recitals and upon the decrees of sale and the confirmation thereof and upon the conveyances and assignments of said property to Northern Pacific Railway Company, all as referred to in said recitals.

51. This defendant alleges that Northern Pacific Railway Company by the General Lien Mortgage duly conveyed to this defendant as trustee as security for the General Lien Bonds to be

issued thereunder all of the Railway Company's right, title and interest in and to certain railroads, estates, lands, properties, rights, privileges, and franchises, and bonds and shares of capital stock, including the following:

"Also all the right, title, estate, interest, and property of the Railway Company (subject to the sales thereof and contracts of sale in respect thereof heretofore made by the Railway Company or by the Northern Pacific Railroad Company, or by any Receiver thereof) in and to any and all the lands granted by the Congress of the United States to aid in the construction and equipment of said railroad, being 25,600 acres of land per mile of said railroad through Territories of the United States, and 12,800 acres per mile through States, at the date of such grant, being the States of Wisconsin, Minnesota and Oregon, and the United States Territories (now States) of North Dakota, Montana, Idaho, and Washington, with the hereditaments and appurtenances thereto belonging or in any wise appertaining, together with the grants of said lands and all rights under such grants, and all the estate, right, title, interest, claim and demand whatsoever which the Railway Company now has or may hereafter acquire or become entitled to, of, in, and to any of the lands aforesaid, and also of, in, and to all the indemnity lands, wherever the same may be situated, that have been or may be acquired by said company to supply deficiencies in the quantities of said granted or mortgaged lands in pursuance of, and in accordance with the terms and provisions of said grants;"

and this defendant further alleges that the General Lien Mortgage was subsequently duly recorded in all offices in which it is, or was, required by law to be recorded in order that it should become a valid lien against all persons, including the plaintiff herein, upon the property in said mortgage mentioned.

52. This defendant alleges that, acting as trustee for all holders of General Lien Bonds at any time outstanding under the General Lien Mortgage, by said mortgage it received the conveyance of all of said property and holds all of said property as an "innocent purchaser for value" within the meaning of the provisions of the Act of June 25, 1929.

FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR AN EIGHTH SEPARATE AND DISTINCT DEFENSE

53. This defendant realleges each and every allegation contained in paragraphs 49, 50, and 51 of this separate answer.

54. This defendant alleges that the holders of the $54,551,500 principal amount of General Lien Bonds now outstanding be-

came such in reliance upon the provisions and recitals in the General Lien Mortgage above referred to, and that said
312 holders of said $54,551,500 principal amount of said bonds are "innocent purchasers for value" of said property within the meaning of the provisions of the Act of June 25, 1929, in so far as said property is required as security for the payment of said bonds.

FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR A NINTH, SEPARATE, AND DISTINCT DEFENSE

55. This defendant realleges each and every allegation contained in paragraphs 49, 50, and 51 of this separate answer.

56. This defendant alleges that said foreclosure causes, and each of them, are and always have been matters of public record; that the General Lien Mortgage, since the due recording thereof in the proper offices as alleged in paragraph 51 of this separate answer, has been a matter of public record and that by such recordation all persons including the plaintiff herein have been put upon notice from the respective dates of such recordation of the rights and interests in and to the property hereinabove referred to of this defendant as trustee and of the holders of General Lien Bonds.

57. This defendant further alleges that the plaintiff herein, the United States of America, had for some time prior to said foreclosure causes and to the making of the General Lien Mortgage and has since that time and up to the present time recognized the title of Northern Pacific Railway Company and its predecessor in interest, Northern Pacific Railroad Company, in and by various acts and resolutions, including the following:

Act of July 15, 1870, 16 Stat. 291, 305;
Act of July 10, 1882, 22 Stat. 157;
Act of July 4, 1884, 23 Stat. 76, 89;
Act of October 19, 1888, 25 Stat. 567;
Act of March 1, 1889, 25 Stat. 771;
Act of September 29, 1890, 26 Stat. 496;
Act of October 1, 1890, 26 Stat. 647;
Act of February 20, 1893, 27 Stat. 468;
Act of March 3, 1893, 27 Stat. 612, 631;
Act of February 26, 1895, 28 Stat. 683;
Act of February 26, 1896, 29 Stat. 17, 22;
Act of June 3, 1896, 29 Stat. 245;
Act of June 11, 1896, 29 Stat. 413, 436;
Act of July 1, 1898, 30 Stat. 597, 621;
Act of March 2, 1899, 30 Stat. 993;

Act of March 2, 1901, 31 Stat. 950;
Act of April 28, 1904, 33 Stat. 538;
Act of March 3, 1905, 33 Stat. 1014;
Act of May 17, 1906, 34 Stat. 197;
Act of June 25, 1910, 36 Stat. 703, 739;
Act of March 4, 1911, 36 Stat. 1289, 1307;
Act of August 26, 1912, 37 Stat. 595, 609;
Act of October 22, 1913, 38 Stat. 208, 217;
Act of July 29, 1914, 38 Stat. 559, 571;
Act of March 4, 1915, 38 Stat. 1138, 1148;
Act of September 8, 1916, 39 Stat. 801, 817;
313 Act of February 27, 1917, 39 Stat. 946;
Act of April 17, 1917, 40 Stat. 2, 18;
Act of February 28, 1919, 40 Stat. 1204;
Act of December 15, 1921, 42 Stat. 1573;
Act of September 20, 1922, 42 Stat. 1710;
Act of February 28, 1923, 42 Stat. 1782; and
Act of March 3, 1925, 43 Stat. 1594.

58. This defendant alleges that the plaintiff has purchased from the Northern Pacific Railroad Company and from the Northern Pacific Railway Company thousands of acres of lands within the place limits and indemnity limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, and has paid large sums to the Northern Pacific Railroad Company and the Northern Pacific Railway Company for said lands; that in several instances the plaintiff has acquired from the Northern Pacific Railroad Company and the Northern Pacific Railway Company under its power of eminent domain, tracts of land within the place limits of the land grant made by the Act of July 2, 1864; that upon the request of the plaintiff, defendant Northern Pacific Railway Company on August 8, 1930, gave to the plaintiff an option to purchase certain lands in the State of Wisconsin patented to the defendant Northern Pacific Railway Company in the year 1914 in satisfaction of mineral indemnity selections made by said defendant Northern Pacific Railway Company under the Act of July 2, 1864; and that every Secretary of the Interior who has held office since the passage of the Act of July 2, 1864, has recognized the Northern Pacific Railroad Company as the federal corporation created by that act and every Secretary of the Interior since 1896 has recognized the Northern Pacific Railway Company as its successor in interest.

This defendant further alleges that, on February 6, 1897, in answer to an inquiry from the then Secretary of the Interior with respect to the propriety of issuing patents to the Northern Pacific Railway Company, Attorney General Harmon advised said Sec-

retary of the Interior that the conditions of the grant under the Act of July 2, 1864, had been fully performed and the right to have lands patented was perfect in the Northern Pacific Railroad Company, that the right of the Northern Pacific Railroad Company to the lands granted passed to the Northern Pacific Railway Company under foreclosure, that the lands were already fully earned and were subject to no condition subsequent, and that the Secretary of the Interior was not justified in refusing to issue patents to the Northern Pacific Railway Company, but should act upon applications for patents by that company upon the same considerations which would govern him in case there had been no foreclosure and the applications were made by the Northern Pacific Railroad Company (21 Op. Att. Gen., 486). This defendant further alleges that thereafter the Secretary of the Interior approved the issuance of patents to the Northern Pacific Railway Company, Attorney-General Harmon advised said Sec- place and indemnity limits of the land grants made to the Northern Pacific Railroad Company by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870.

This defendant further alleges that on November 21, 1899, and again on December 26, 1899, the Secretary of the Interior rendered decisions recognizing the Northern Pacific Rail-
314 way Company as the successor in interest of the Northern Pacific Railroad Company and as entitled to the land grants made to the Northern Pacific Railroad Company (29 L. D. 316 and 387).

This defendant further alleges that on April 12, 1905, Attorney-General Moody confirmed the opinion given by Attorney-General Harmon under date of February 6, 1897, and advised the Secretary of the Interior that he should continue to be governed by the rule laid down in said opinion (25 Op. Att. Gen. 401); and that thereafter the Secretary of the Interior approved the issuance of patents to the Northern Pacific Railway Company for several million acres of land within the place and indemnity limits of the land grants made to the Northern Pacific Railroad Company by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870.

This defendant further alleges that, in reliance upon the validity of the patents from the United States to Northern Pacific Railroad Company and Northern Pacific Railway Company millions of acres of patented lands have been sold to the public by Northern Pacific Railway Company and by Northern Pacific Railroad Company.

This defendant further alleges that the plaintiff herein from 1865 to 1896 dealt with and treated defendant, Northern Pacific

Railroad Company, as the corporation created by the Act of July 2, 1864, and since 1876, pursuant to various acts of Congress, has from time to time required defendant, Northern Pacific Railroad Company, and defendant, Northern Pacific Railway Company, to transport mails, troops and property of the United States on the lines of railroad of said Companies at reduced rates as provided in section 11 of said Act and has continued to require said defendant, Northern Pacific Railway Company, to transport mails, troops and property of the United States at reduced rates down to and including the present time.

59. This defendant alleges that the plaintiff by its acts and conduct is estopped and barred from instituting and from prosecuting any suit against this defendant because of any of the matters alleged in said bill of complaint.

FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR A TENTH, SEPARATE AND DISTINCT DEFENSE

60. This defendant realleges each and every allegation contained in paragraphs 49, 50, 51, 56, 57, and 58 of this separate answer.

61. This defendant alleges that, in reliance upon some or all of the facts and matters set forth in said paragraphs, this defendant joined as trustee in the execution of the General Lien Mortgage and undertook the execution of the trusts thereby imposed and has continued to act as trustee under said mortgage; and that the plaintiff herein is now estopped from obtaining any relief against this defendant.

FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR AN ELEVENTH, SEPARATE AND DISTINCT DEFENSE

62. This defendant realleges each and every allegation contained in paragraphs 49, 50, 51, 56, 57, and 58 of this separate answer.

315 63. This defendant alleges that, in reliance upon some or all of the facts and matters set forth in said paragraphs, many persons, members of the general public, from time to time have purchased and have continued to hold the General Lien Bonds, secured by the General Lien Mortgage, and that such persons now hold $54,551,500 principal amount of said bonds; and this defendant further alleges that the plaintiff is now estopped from obtaining any relief, against this defendant or otherwise, that would impair the security of said mortgage or that would in any way prejudice the rights of said bondholders.

FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR A TWELFTH, SEPARATE AND DISTINCT DEFENSE

64. This defendant realleges each and every allegation contained in paragraphs 48, 49, 50, 51, 52, 54, 56, 57, 58, 61, and 63 of this separate answer and alleges that the equity of the holders of the General Lien Bonds secured by the General Lien Mortgage, and of those claiming through or under them, is superior to any equity of the plaintiff with respect to the matters alleged in said bill of complaint.

FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR A THIRTEENTH, SEPARATE AND DISTINCT DEFENSE

65. This defendant further alleges that

On the third day of September 1897, in the Circuit Court of the United States, in and for the District of Minnesota, Fifth Division, this plaintiff filed its bill in equity entitled, "The United States of America, Complainant, vs. The Northern Pacific Railroad Company, a corporation: The Northern Pacific Railway Company, a corporation, and Edwin H. McHenry and Frank G. Bigelow, as Receivers of The Northern Pacific Railroad Company. Defendants," in which bill as amended the plaintiff alleged:

"That the defendant, the Northern Pacific Railroad Company is and was at all the times hereinafter stated a railroad corporation duly created, organized, and existing under a certain act of Congress entitled 'An Act Granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the northern route' approved July 2nd, 1864, and the Acts amendatory thereof and supplemental thereto, and having its principal place of business in the city of Saint Paul, County of Ramsey, and State of Minnesota."

In said bill of complaint the plaintiff set out the provisions of said Act of July 2, 1864, relating to the grant of lands to the Northern Pacific Railroad Company, its successors and assigns, and alleged that the City of Duluth was the eastern terminus or eastern initial point of the grant to the Northern Pacific Railroad Company, and that a certain tract of land therein described was, prior to the 22nd day of April 1895, a part of the public domain of the United States lying and being more than ten miles east of the aforesaid eastern terminus and without the limits of the grant to said Northern Pacific Railroad Company under said Act of July 2nd, 1864, and alleged further that on the 22nd day of April 1895, ministerial officers of the United States through

inadvertence and mistake conveyed by patent the described tract of land to the Northern Pacific Railroad Company under the erroneous impression and mistaken belief that said tract of land lay within the limits of the aforesaid grant and plaintiff
316 prayed that said tract of land be restored to the plaintiff.

Defendant Northern Pacific Railroad Company, in the joint answer filed by it and the Receivers of the Northern Pacific Railroad Company, admitted that it was then and at all times mentioned in the bill of complaint had been a railroad corporation created, organized and existing under the Act of July 2, 1864. The case was tried on an agreed statement of facts made on the 28th day of October 1898, in which the parties stipulated:

"That the defendant, The Northern Pacific Railroad Company, is a corporation created, organized, and existing under and by virtue of an act of congress approved July 2, 1864, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route,' and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof."

In said agreed statement it was further stipulated that the Northern Pacific Railroad Company constructed its line of railroad from Ashland, Wisconsin, to Wallula Junction, in the State of Washington, and from a point sixteen miles north of Wallula Junction over and across the Cascade Mountains to the City of Tacoma, in the State of Washington, and from Tacoma to Portland, in the State of Oregon, and that the whole of said line of railroad was accepted by the President of the United States as provided in said Act of Congress of July 2, 1864. After trial and argument a decree was entered on the 20th day of February, 1899, by which it was ordered, adjudged, and decreed that the bill of complaint of the complainant be dismissed for want of equity. Thereafter an appeal from said decree was taken by the United States to the Circuit Court of Appeals of the Eighth Judicial Circuit and the decree below was affirmed in a decision made on the 10th day of July, 1899, reported in 95 Federal Reporter, page 864. Thereafter an appeal was taken by the United States from the decree of the Circuit Court of Appeals to the Supreme Court of the United States and the decree of the Circuit Court of Appeals was affirmed in a decision made on the 16th day of April, 1900, and reported in Volume 177 U. S., page 435.

66. This defendant further alleges that

On the 27th day of July, 1897, the plaintiff herein filed in the Circuit Court of the United States for the District of Washington, Western Division, a bill of complaint entitled, "The

United States of America, Plaintiffs, vs. The Northern Pacific Railroad Company, and the Northern Pacific Railway Company, Defendants", wherein it was alleged "that the defendant, the Northern Pacific Railroad Company, is a corporation organized and existing under and by virtue of an Act of Congress, approved on the 2d day of July, 1864, entitled 'An Act granting lands to aid in the construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern Route'"; that certain tracts of land situated in the Western Division of the District of Washington comprising several thousand acres were owned by the United States on the 24th day of May, 1895, and on the 27th day of May, 1895; that in a certain suit begun in the Circuit Court of the United States, for the Eastern District of Wisconsin, wherein the Farmers' Loan and Trust Company, of New York, was plaintiff, and the Northern Pacific Railroad Company and others were defendants, the
317 court "having then full and competent jurisdiction in the premises, proceeded to foreclosure a certain mortgage against the said Northern Pacific Railroad Company, and thereafter, and during the pendency of said action, an ancillary bill was filed and subsequent proceedings were had in the same case in the Circuit Court of the United States, for the District of Washington, and in the Northern Division thereof, in which said proceedings the said Circuit Court for the District of Washington, and the Northern Division thereof, having full power in the premises, did, on or about the 25th day of July, 1895, order, direct, and decree that all of the interest of the said Northern Pacific Railroad Company in the above described, and other lands, be sold to satisfy the said mortgage and other indebtedness of said company, and that the said lands were sold to the Northern Pacific Railway Company,"

and it was further alleged in said bill of complaint that the Northern Pacific Railway Company had acquired the said lands as the successor in interest of the said Northern Pacific Railroad Company, if they had acquired the same, and that the Northern Pacific Railway Company held the same by reason of purchase at a public sale held at the City of Seattle, in the State of Washington, under and by virtue of a decree of the said courts dated the 3rd day of August, 1895; that the said lands so acquired were held by the Railway Company under said decrees and by reason of the said sale as successor of the said Northern Pacific Railroad Company; and that patents to said lands were erroneously issued to the Northern Pacific Railroad Company as a part of its land grant. It was prayed that the patents so erroneously issued be cancelled and set aside. An agreed statement of facts was entered

into by the parties and filed in the suit on the 12th day of May, 1900. Said agreed statement was signed by John W. Griggs, Attorney-General of the United States. In said stipulation the parties agreed:

"That at all the times hereinafter mentioned the Northern Pacific Railroad Company was a corporation, organized, created, and existing under and by virtue of an act of Congress, approved July 2, 1864, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route.'

"That prior to the year 1875, the Northern Pacific Railroad Company completed the construction of that portion of its road extending from Kalama to Tacoma, upon the line of definite location thereof; and thereupon the President of the United States appointed commissioners to examine that portion of said road, and said commissioners duly reported that the same had been constructed in a good, substantial and workmanlike manner, in all respects as required by the act making the grant; and thereupon, to wit, on the first day of January, 1875, the President of the United States approved the report of said commissioners and accepted said portion of said road, as required by the act making the grant.

"That thereafter said Northern Pacific Railroad Company completed the construction of that portion of said road extending from Kalama, in the then Territory of Washington, to the city of Portland, in the State of Oregon; that said portion of said road was constructed upon said line of definite location; and thereupon the President of the United States appointed commissioners to examine said portion of said road, and said commissioners duly reported that the same had been constructed in a good, substantial and workmanlike manner, in all respects, as required by the act making the grant; and thereupon, and on October 5, 1883, the President of the United States duly approved the report of said commissioners and accepted said portion of said road, as required by the act making the grant.

"That on or about the 23rd and 27th days of May, 1895, the United States issued and delivered to the Northern Pacific Railroad Company letters patent, in due form of law,
318 conveying to said Northern Pacific Railroad Company the legal title to all the lands described in the bill of complaint and involved in this suit.

"That the decree of the Circuit Court of the United States for the Eastern District of Wisconsin, and of the Circuit Court of the United States for the District of Washington, alleged in the bill and admitted in the answer thereto, was rendered in a suit of

equity, instituted by the Farmer's Loan and Trust Company, for the purpose of foreclosing three certain mortgages, executed and delivered by the said Northern Pacific Railroad Company, upon certain property of said company, including the lands described in the bill of complaint, under said decree, and by virtue of certain deeds of conveyance, executed in pursuance of said decree, the Northern Pacific Railway Company acquired all the interest of the Northern Pacific Railroad Company in and to those lands described in the bill of complaint, which, at the date of said sale, were undisposed of by said Northern Pacific Railroad Company, by virtue of sales, contracts, and deeds as hereinafter set forth." On the 1st day of August 1901, after trial and argument of said cause a decree was entered, ordering, adjudging and decreeing that the bill of complaint of the complainant be dismissed for want of equity. Thereafter an appeal was taken by the United States to the Circuit Court of Appeals for the Ninth Circuit, which court certified to the Supreme Court of the United States certain questions on which it desired instructions. Thereafter the whole record and cause were required to be sent up to the United States Supreme Court for consideration, and in that court, by a decision made on the 23rd day of February 1904, and reported in Volume 193 U. S., 1, the decree of the Circuit Court was affirmed. In said decision the court held:

"The line east of Portland provided for in the act of 1864 formed nearly a right angle at Portland with the line from there to Puget Sound provided for in the joint resolution, and thus the two grants overlapped, and the lands in suit fell within the overlap.

"But the line down the Columbia from Wallula to Portland was never built and the grant was forfeited September 29, 1890, 26 Stat. 496, c. 1040, while the line from Portland to Puget Sound and east across the Cascade Mountains was built and the grants earned" (p. 6).

67. This defendant further alleges that

On the 5th day of March 1907, the plaintiff herein filed in the Circuit Court of the United States for the Eastern District of Washington a bill of complaint signed by Charles J. Bonaparte, Attorney-General, entitled The United States of America, Complainant, vs. Northern Pacific Railway Company, et al, Defendants, wherein it was sought to cancel patents for lands issued to the Northern Pacific Railroad Company and the Northern Pacific Railway Company within the Yakima Indian Reservation upon the alleged erroneous and mistaken belief that said lands were included within the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, and were

outside of said reservation. In said bill of complaint it was alleged:

"That said defendant, Northern Pacific Railway Company, did, on or about the 1st day of September 1896 by transfer and conveyance, become the successor in interest in and to all of the property, rights and interests of the Northern Pacific Railroad Company, a corporation organized and existing under and by virtue of an Act of Congress passed July 2, 1864 (13 Stat. 365), and entitled, 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern route.' That the
319 property rights and interests so transferred and conveyed by said last-named corporation to said defendant, Northern Pacific Railway Company, included all rights to the public lands granted, or to be granted, by the United States to said Northern Pacific Railroad Company under and by the terms of said Act of Congress, and, in terms, all lands for which patents had been theretofore issued to said corporation by the United States, said last mentioned lands being described in Exhibit 'A', hereto annexed, as having been patented prior to September 1, 1896."

In answer to said bill of complaint, defendant Northern Pacific Railway Company admitted that it became on or about the first day of September 1896, as alleged, successor in interest to all the property, rights and interest of the Northern Pacific Railroad Company, a corporation under the Act of Congress of July 2, 1864; and that among said property and rights were the public lands granted and to be granted by the United States under the said Act of Congress and amendments thereto.

In the answer of the Northern Pacific Railroad Company it was admitted that defendant Northern Pacific Railroad Company was a corporation organized and existing under and by virtue of the Act of July 2, 1864. At the trial of said suit it was stipulated by the parties thereto:

"that the Northern Pacific Railroad Company was duly organized and created as a corporation on the 2d day of July, 1864, by Act of Congress for the purpose of building and operating a railroad through the states and territories lying between said points, including the territory of Washington. That the Northern Pacific Railway Company is the lawful successor in interest of the Northern Pacific Railroad Company."

On the 25th day of September 1909, a decree was entered in said suit cancelling said patents and holding that the United States was the owner of and entitled to the possession of the land covered by said patents subject to the rights of the Yakima

Indians. Said case was subsequently appealed to the Circuit Court of Appeals of the Ninth Circuit and there affirmed. An appeal was taken from the decree of the Circuit Court of Appeals to the Supreme Court of the United States, and that court by decision dated February 24, 1913, reported in Volume 227 U. S., page 355, affirmed said decree. In its decision the Supreme Court held:

"There is no question made of the title of the railroad and railway companies or of their respective vendees other than as the lands fall within or without the reservation. If they were within the boundaries of the reservation they were lands of the Indians; otherwise, public lands of the United States and passed to the companies, respectively, under the act of Congress and the patents issued in pursuance thereof" (p. 356).

68. This defendant further alleges that

On the 5th day of June 1915, plaintiff herein filed a bill of complaint in the District Court of the United States in and for the District of Montana, entitled, "United States of America, Complainant vs. Northern Pacific Railway Company, a corporation, Defendant", wherein it was sought to have cancelled certain patents to lands within the Gallatin Forest Reserve, which lands, it was alleged, were erroneously patented to the Northern Pacific Railway Company. In said bill of complaint plaintiff alleged:

"I

"That the defendant Northern Pacific Railway Company is now, and at all of the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin.

320 "II

"That the Northern Pacific Railroad Company was a corporation organized and existing under and by virtue of the Act of Congress of the United States, approved July 2, 1864, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route' (13 Stats. 365).

"III

"That the said defendant Northern Pacific Railway Company is the assignee and successor in interest of the said Northern Pacific Railroad Company, of, in and to all properties, lands, rights, grants, privileges and franchises granted to said Northern

Pacific Railroad Company by the aforesaid Act of Congress approved July 2, 1864, and by all acts supplemental thereto and amendatory thereof."

Defendant Northern Pacific Railway Company in its answer to said bill of complaint admitted that the defendant was a corporation and assignee and successor in interest of the Northern Pacific Railroad Company of, in and to all properties, lands, rights, grants, privileges and franchises granted to the Northern Pacific Railroad Company by Act of Congress approved July 2, 1864, as alleged in the bill. The cause came on for hearing on the bill of complaint, answer and statement of agreed facts, and by decree entered on November 21, 1918, it was ordered, adjudged and decreed that the bill of complaint be dismissed. An appeal was taken from said decree to the Circuit Court of Appeals of the Ninth Circuit, wherein said decree was affirmed. Subsequently an appeal was taken from the decree of the Circuit Court of Appeals to the Supreme Court of the United States. The decision of the Supreme Court is reported in 256 U. S., page 51. The court said:

"The lands in question are within the indemnity limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365, as modified and supplemented by the joint resolution of May 31, 1870, 16 Stat. 378, and were selected and patented as indemnity for lands lost within the place limits. The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other (p. 58).

* * * * *

"The company duly accepted the terms of the grant, filed appropriate maps of the general route, afterwards definitely located the line in the mode prescribed, and constructed and completed the road from Ashland, Wisconsin, on Lake Superior, to Tacoma, Washington, on Puget Sound, and thence to Portland, Oregon, its full length being more than 2,000 miles. The definite location was completed in 1884 and the construction in 1887. The road as completed was examined and favorably reported by the commissioners and accepted by the President. Reports of Commissioner of Railroads—for 1885, p. 22; 1886, p. 36; 1887, p. 24; 1888, p. 24; Doherty v. Northern Pacific Ry. Co., 177 U. S. 421; United States v. Northern Pacific R. R. Co., 95 Fed. Rep. 864; s. c. 177 U. S. 435; United States v. Northern Pacific R. R. Co., 193 U. S. 1" (p. 60).

The court held that if there was a deficiency in the grant the Railway Company was entitled to a decree and remanded the

case to the District Court with directions for further proceedings to determine that question.

321 69. This defendant further alleges that the interest or interests of this defendant in the property which is the subject matter of this suit exists or exist by virtue of the General Lien Mortgage, under which Northern Pacific Railway Company conveyed to this defendant as trustee thereunder all its right, title, interest and property in and to any and all lands granted by the Congress to aid in the construction of the railroad in said mortgage mentioned, and that by virtue of said mortgage there has been vested in this defendant not only a lien upon certain lands heretofore from time to time conveyed by the United States to Northern Pacific Railroad Company and/or Northern Pacific Railway Company (including lands so conveyed to Northern Pacific Railway Company after one or more of the judgments and decisions in the paragraphs numbered 65 to 68, inclusive, of this separate answer mentioned), but also a right that the lien of said mortgage should extend to lands from time to time hereafter conveyed by the United States to Northern Pacific Railway Company, and that, therefore, the judgments and decisions hereinabove in said paragraphs numbered 65 to 68, inclusive, of this separate answer referred to were rendered in litigation between the plaintiff herein and the predecessor or predecessors in interest of this defendant; and this defendant is advised and, therefore, further alleges that said judgments and decisions were and are binding upon this defendant, but only in so far as they relate to lands claimed by Northern Pacific Railway Company under the provisions of the Act of July 2, 1864 and/or the Joint Resolution of May 31, 1870, and not conveyed by the United States to Northern Pacific Railway Company prior to the respective dates of said decisions. This defendant further alleges that the several courts whose judgments and decisions are above referred to had jurisdiction over the parties to and the subject matter of said causes, and that said judgments and decisions, and all of them, were rendered on the merits and were final, and that no appeal is pending thereon, or upon any of them; and this defendant further alleges that by virtue of said judgments and decisions, or some of them, it has been conclusively established as between the plaintiff herein and this defendant, and/or all holders of General Lien Bonds (1) that Northern Pacific Railroad Company was duly organized under the Act of July 2, 1864, (2) that Northern Pacific Railroad Company did build the railroad and telegraph line authorized by said Act and by the Joint Resolution of May 31, 1870, (3) that said railroad and telegraph line was accepted by the

United States as provided in said Act of July 2, 1864, (4) that Northern Pacific Railroad Company did own and operate said railroad and telegraph line from its construction until the beginning of receivership proceedings in 1893, and (5) that Northern Pacific Railway Company is the successor in interest to Northern Pacific Railroad Company by purchase at a valid foreclosure sale of said railroad and telegraph line and of the land grants made to Northern Pacific Railroad Company and of all other properties of Northern Pacific Railroad Company.

70. This defendant alleges that, in reliance upon some or all of the matters set forth in the paragraphs numbered 65 to 69, inclusive, of this separate answer, this defendant has continued to act as trustee under the General Lien Mortgage and many persons, members of the general public, from time to time have purchased and have continued to hold the General
322 Lien Bonds, secured by the General Lien Mortgage, and that such persons now hold $54,551,500. principal amount of said bonds.

71. This defendant alleges that the plaintiff herein is now estopped and barred from claiming as against this defendant and/or as against the holders of General Lien Bonds: (1) that Northern Pacific Railroad Company was not duly organized under the Act of July 2, 1864, or (2) that Northern Pacific Railroad Company did not build the railroad and telegraph line authorized by said Act and by the Joint Resolution of May 31, 1870, or (3) that said railroad and telegraph line was not accepted by the United States as provided in said Act of July 2, 1864, or (4) that Northern Pacific Railroad Company did not own and operate said railroad and telegraph line from its construction until the beginning of the receivership proceedings in 1893, or (5) that Northern Pacific Railway Company is not the successor in interest to Northern Pacific Railroad Company by purchase at a valid foreclosure sale of said railroad and telegraph line and of the land grants made to Northern Pacific Railroad Company and of all other properties of Northern Pacific Railroad Company.

FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR A FOURTEENTH, SEPARATE AND DISTINCT DEFENSE

72. This defendant realleges each and every allegation contained in the paragraphs numbered 65, 66, 68, and 69 of this separate answer and alleges that by the judgments in said paragraphs numbered 65, 66, and 68 referred to, or some of them, all matters in litigation in the above-entitled cause and described in said

paragraph numbered 69 were finally adjudicated and settled and that the plaintiff is thereby debarred from prosecuting this action.

FURTHER ANSWERING SAID BILL OF COMPLAINT AND FOR A FIFTEENTH, SEPARATE AND DISTINCT DEFENSE

73. This defendant realleges each and every allegation contained in the paragraphs numbered 65, 66, 68, and 69 of this separate answer and alleges that in the causes in said paragraphs numbered 65, 66, and 68 referred to, or in some of them, all matters in litigation in the above-entitled cause and described in said paragraph numbered 69 were at issue, were material and were finally adjudicated and settled on the merits as between the plaintiff herein and the predecessor or predecessors in interest of this defendant, and that said matters have by reason of the judgments in said causes become and now are res judicata.

Wherefore, this defendant, City Bank Farmers Trust Company prays—

(1) That an order be entered herein striking out all of the paragraphs of said bill of complaint numbered IV, VI to VIII, X to XVI, XVIII, XIX, XXII to XXXVI, and XXXVIII to XLI, all numbers inclusive, those portions of the paragraph thereof numbered IX beginning on page 14 of said bill of complaint at line 12 and continuing through line 30 on said page and beginning on page 15 at line 14 and continuing through line 18 on page 22, and that portion of the paragraph thereof numbered X beginning on page 22 at line 20 and continuing through line 16 on page 23 (together with the words "hereinafter referred to" in lines 20–21 and the words "as more fully hereinafter set forth" in lines 23–24 on page 23).

323 (2) For judgment that the bill of complaint herein be dismissed as against this defendant with costs.

Dated, January 6, 1931.

TAYLOR, BLANC, CAPRON & MARSH,
Office and Post Office Address,
No. 43 Exchange Place, New York, N. Y.
E. J. CANNON, *Spokane, Washington,*
Solicitors for defendant, City Bank Farmers Trust Company.

MANSFIELD FERRY,
EDWARD E. WATTS, JR.,
HENRY R. LABOUISSE,
Of Counsel.
E. J. CANNON,
Of Counsel.

422 *Exhibit 2 to answer*

List of corrections necessary to make plaintiffs exhibits G, H, J, K, and L (being mortgages made by Northern Pacific Railroad Company to this defendant as trustee) true and correct copies of the respective documents:

IN EXHIBIT G (FIRST MORTGAGE MISSOURI DIVISION DATED MAY 1, 1879)

(a) Page 138, line 22 of the first full paragraph: after "grounds" the words "and other grounds" have been omitted.

(b) Same page, line 25: "building" should be "buildings".

(c) Same page, line 41: between "its" and "railroad" the word "said" has been omitted.

(d) Page 144, line 3: "line" should be "lien".

(e) Page 146, line 16: between "and the" and "denominations and" the word "numbers," has been omitted.

(f) Page 149, line 2 of the last paragraph: "Presidnet" should be "President".

IN EXHIBIT H (FIRST MORTGAGE PEND D'OREILLE DIVISION DATED SEPTEMBER 1, 1879)

(g) Page 154, line 5 of the first full paragraph in the form of bond: between "the" and "United" the word "said" has been omitted.

(h) Page 159, line 34: the words "be" and "then" have been transposed.

IN EXHIBT J (GENERAL SECOND MORTGAGE DATED NOVEMBER 20, 1883.

(i) Page 190, line 24: between "and" and "Portland" the word "from" has been omitted.

(j) Same page, line 31: "pourpse" should be "purpose".

(k) Same page, line 62: between "and" and "recorded" the word "are" has been omitted.

(l) Page 192, line 23: between "for" and "said" the word "the" has been omitted.

(m) Same page, line 52: "authorized" should be "authorized".

(n) same page, line 63: after "preferred stock," the punctuation mark ")" has been omitted.

(o) Same page, line 66: "profit" should be "profits".

(p) Page 193, line 15: "bonds" should be "lands".

(q) Same page, line 23: "on" should be "or".

(r) Same page, line 1 of the form of trustee's certificate: "the bond" should be "this bond".

(s) Same page, line 3 of the last paragraph: "hereof" should be "whereof".

(t) Same page, line 7 of the last paragraph: "releaseed" should be "released".

(u) Page 194, line 11: "casements and appertenances" should be "easements and appurtenances".

423 (v) Same page, line 14: "freigt" should be "freight".

(w) Same page, line 15: "erection" should be "erections".

(x) Same page, line 25: "annuities" should be "immunities".

(y) Same page, line 37: "appurturances" should be "appurtenances".

(z) Same page, line 56: "railway" should be "railroad".

(aa) Page 195, line 3 of the first full paragraph: "francises" should be "franchises".

(bb) Same page, line 1 of the second full paragraph: "bonds" should be "lands".

(cc) Same page, line 7 of Article Second: "its" should be "it".

(dd) Page 196, line 16: "notably" should be "ratably".

(ee) Same page line 17 of Article Third: "adjoin" should be "adjourn".

(ff) Same page, line 30 of Article Third: between "of railroad," and "or" the words "or in managing the business thereof, while in possession, and all paymonts which may have been made by it, for taxes and assessments on said line and lines of railroad," have been omitted.

(gg) Same page, line 38 of Article Third: "rotably" should be "ratably".

(hh) Same page, line 39 of Article Third: "of" should be "to".

(ii) Same page, line 5 of Article Fourth: "to and in" should be "to aid in".

(jj) Page 197, line 7: "rotably" should be "ratably".

(kk) Page 198, line 18 of Article Ninth: "house" should be "houses".

(ll) Same page, line 6 from bottom of page: "it its discretion" should be "at its discretion".

(mm) Page 199, line 3 of Article Tenth: "Peud d'Oreille" should be "Pend d'Oreille".

(nn) Same page, line 9 of Article Tenth: "banks" should be "lands".

(oo) Same page, lines 2 and 3 of last paragraph: "conmity" should be "conformity".

(pp) Page 201, lines 10 to 13 of the fourth paragraph: "; with the coupons thereto belonging; and the trustees shall also pay over and deliver to the said railroad company" has been repeated.

(qq) Page 202, line 15 of the third paragraph: "full" should be "free".

(rr) Page 203, line 22: between "action" and "for" the words "or right of suit or action," have been omitted.

(ss) Page 204, line 3 of Article Sixteenth: "herafter" should be "hereafter".

(tt) Same page, line 9 of Article Sixteenth: "bonds" should be "lands".

IN EXHIBIT K (GENERAL THIRD MORTGAGE DATED DECEMBER 1, 1887)

(uu) Page 207, line 16: "right" should be "rights".

(vv) Page 208, line 22: "system" should be "systems".

(ww) Page 209, line 2: "concession" should be "conversion".

(xx) Page 211, line 19 of the long paragraph: "right of way" should be "rights of way".

(yy) Page 213, line 3: "covenent" should be "covenant".

424 (zz) Same page, line 7: "privileged" should be "privileges".

(aaa) Same page, last line: "Nrw York" should be "New York".

(bbb) Page 215, line 16: "with discrimination or preference" should be "without discrimination or preference".

(ccc) Same page, line 14 of Article Eighth: "revise" should be "reverse".

(ddd) Page 218, line 26: "payment" should be "payments".

(eee) Page 220, next to the last line of Article Fourteenth: "concurring" should be "concerning".

IN EXHIBIT L (CONSOLIDATED MORTGAGE DATED DECEMBER 2, 1889)

(fff) Page 226, line 3 of paragraph "2": "Madena" should be "Wadena".

(ggg) Page 228, line 6 of paragraph "9": "entension" should be "extension".

(hhh) Page 229, line 1 of paragraph "14": between "Mountain" and "Company" the word "Railroad" has been omitted.

(iii) Page 230, line 19: "Chotean" should be "Choteau".

(jjj) Page 231, line 4 of paragraph "19": between "Puget" and "Shore" the word "Sound" has been omitted.

(kkk) Page 233, line 20: "sighed" should be "signed".

(lll) Page 237, line 15: between "interest" and "the" the word "of" has been omitted.

(mmm) Page 242, line 11: "perference" should be "preference".

(nnn) Same page, line 4 of Article Thirteenth: "covenent" should be "covenant".

(ooo) Same page, line 18 of Article Thirteenth: "raise" should be "waive".

(ppp) Page 246, line 11 of Article Twenty-second: "its" should be "it".

431 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Stipulation re amendment of bill of complaint

Filed June 25, 1931

It is hereby stipulated by and between the plantiff in the above-entitled cause and the defendants therein, Northern Pacific Railway Company, Northwestern Improvement Company, Bankers Trust Company, Guaranty Trust Company, and City Bank Farmers Trust Company, subject to the approval of said Court:

1. That the plaintiff may amend its bill of complaint by adding thereto a paragraph immediately following line 23 on page 49 of said bill to be marked lines "23–1" to "23–97," inclusive, which proposed amendment reads as follows:

"That the said Northern Pacific Railway Company contending that a deficiency exists in the said land grant and in furtherance of such contention is now asserting the right under the provisions of the Act of July 2, 1864, as modified and supplemented by
432 the said Joint Resolution of May 31, 1870, by certain claims filed and recorded with the officers of the Interior Department, to acquire in satisfaction of the said land grant and the acreages thereof certain lands of your plaintiff aggregating 24,000 acres, more or less, situate in Montana within the primary limits of the said grant and within the mineral indemnity limits of said grant in satisfaction of certain alleged mineral losses which the defendant, Northern Pacific Railway Company, claims were sustained in the primary limits of the said grant by reason of the classification by your plaintiff of certain lands therein as mineral; that the said claims of the Northern Pacific Railway Company as aforesaid, as filed and recorded with the officers of the Interior Department as aforesaid, are without merit, but nevertheless they constitute a cloud upon the title of the United States to the said lands, which cloud your complainant is entitled to have removed; that the said 24,000 acres, more or less, are a portion of a larger tract of lands of your plaintiff amounting to 358,049 acres, more or less, which the Northern Pacific Railway Company claims the right to select, for the same reasons which it sets forth as a basis for its right to select the said 24,000 acres, more or less; that the said 358,049 acres, more or less, of

lands are unsurveyed, with the exception of 27,000 acres, more or less, which have been surveyed; that the said lands, including the said 24,000 acres, more or less, are set forth in Exhibit DD attached to and made a part of this bill of complaint; that in connection with said lands your plaintiff alleges that on October 17, 1868, a reservation was created in the Territory of Montana for the Crow Indians, and thereafter, to wit, on June 27, 1881, while said Indian reservation was in full force and effect, a portion of the route of the Northern Pacific railroad through Montana was definitely located through the said
433 Indian reservation; that the lands within said reservation and embraced within the primary limits of the land grant provided by the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, were excepted from the said land grant as primary lands under the provisions of Section 3 of the said Act; that thereafter, to wit, on April 11, 1882, certain of the said lands within the primary limits of said land grant and situate within the said reservation for the Crow Indians were restored to the public domain; that thereafter 358,049 acres, more or less, of the said lands situate within fifty miles of the line of the Northern Pacific railroad were set apart and reserved by your plaintiff as forest reserves or national forests; that the said reservations were made before any selection thereof had been filed by the Northern Pacific Railway Company; that the said reservations as forest reserves or national forests were made as follows, to wit: 232,609 acres, more or less, of the said lands were withdrawn on September 4, 1902; 18,240 acres, more or less, of the said lands were withdrawn on March 4, 1904; 2,720 acres, more or less, of the said lands were withdrawn on November 3, 1906; and 4,450 acres, more or less, of the said lands were withdrawn on March 2, 1907; that neither at the time of any or all of the said withdrawals of the said lands nor since has a deficiency in the acreage of the said land grant under the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, been ascertained by the Secretary of the Interior; that ever since the said lands were so set apart and withdrawn, they have continued to be and now are set apart, occupied and appropriated as forest reserves or national forests of your plaintiff, the right and proper designation of such re-
serves since the Act of March 4, 1907 (34 Stat. 1256) being
434 national forests; that the said lands so withdrawn as aforesaid are now parts and parcels of either one or the other of the Absoraka or Beartooth National Forests; that the extent to which the said lands or any of them are agricultural and nonmineral in character is unknown to your plaintiff; that

the Northern Pacific Railway Company well knowing of the said withdrawals acquiesced therein and without taking any or all necessary steps toward the acquisition of said lands until many years after the said lands had been withdrawn by and had been under the administration, protection, and control of your plaintiff; that although neither the defendant Northern Pacific Railway Company nor any of the other defendants herein have any right to select or to receive any of the said lands under the provisions of said grant or of any acts supplemental or relating thereto, or otherwise, or have any right, title, or interest therein, the claims of the said Northern Pacific Railway Company of such rights cast a cloud on the title of the plaintiff in said lands; that the plaintiff is entitled to have its title in and to such lands quieted from the cloud cast thereon by the claims of said defendants and all of them.

"That ever since the said withdrawals of the said lands set forth in Exhibits O, Q, and DD, your plaintiff has expended large sums of money in the protection, administration, improvement, and control of the said lands, and the said withdrawals, the purpose thereof and the said expenditures were well known to and were acquiesced in by the defendants herein without protest or objection to your plaintiff."

2. That the plaintiff may amend its bill of complaint by adding thereto a subdivision to be marked subdivision "XXIX–A" to be shown immediately following page 84 of said bill, which proposed amendment reads as follows:

435 "XXIX–A

"That in the administration of and under the said land grant of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, certain lands situate within the primary limits of said grant and certain other lands situate within the indemnity limits of said grant, which said primary and indemnity lands are set forth and described in Exhibit EE attached to and made a part of this bill of complaint, were through error and mistake, as hereinafter set forth, approved or patented by your plaintiff to the Northern Pacific Railroad Company or the Northern Pacific Railway Company; that the said lands are situate, as shown by their descriptions, within certain of the States of North Dakota, Montana, Minnesota, and Washington.

"That certain of said primary lands which were so approved or patented in error and mistake were lots 1 and 6, Sec. 15, T. 137 N., R. 80 W., North Dakota, the same being set forth and described in Tabulation A of Exhibit EE hereof; that the route of the Northern Pacific railroad was definitely located opposite

the said lands, and on July 20, 1880, the map of definite location covering the said route was filed with the plaintiff herein; that on July 20, 1880, the date of the filing with your plaintiff of the said map of definite location as aforesaid, the said primary lands were embraced in and were a part and parcel of the Fort Rice military reservation, having been withdrawn therefor by Executive Order of the President of the United States on September 2, 1864; that at all times between September 2, 1864 and July 21, 1880, the said lands were a part and parcel of the Fort Rice military reservation and by reason thereof were withdrawn from and were never subject to acquisition under the provisions of the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870.

"That certain of said primary lands which were so approved or patented in error and mistake were lots 5 and 6, Sec. 29,
436 T. 138 N., R. 80 W., North Dakota, the same being set forth and described in Tabulation A of Exhibit EE hereof; that the route of the Northern Pacific railroad was definitely located opposite the said lands, and on July 20, 1880, the map of definite location covering the said route was filed with the plaintiff herein; that on July 20, 1880, the date of the filing with your plaintiff of the said map of definite location as aforesaid, the said primary lands were embraced in and were a part and parcel of the Fort Lincoln military reservation, having been withdrawn therefor by Executive Order of the President of the United States on February 11, 1873; that at all times between February 11, 1873, and July 21, 1880, the said lands were a part and parcel of the Fort Lincoln Military reservation, and by reason thereof were withdrawn from and were never subject to acquisition under the provisions of the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870.

"That certain of said primary lands which were so approved or patented in error and mistake were all of the said primary lands set forth and described in Tabulation A of Exhibit EE hereof, the said lands being situate in North Dakota; that the route of the Northern Pacific railroad was definitely located opposite the said lands, and on July 20, 1880, the map of definite location covering the said route was filed with the plaintiff herein; that on July 20, 1880, the date of the filing with your plaintiff of the said map of definite location as aforesaid, the said lands and all of them (other than lots 1 and 5, Sec. 15, T. 137 N., R. 80 W., and lots 5 and 6, Sec. 29, T. 138 N., R. 80 W., hereinabove referred to) were embraced in and were a part and parcel of the Great Sioux Indian Reservation, having been withdrawn therefor and included therein in pursuance of an agreement of September 10, 1876, between your plaintiff and the Indians, parties thereto,

which agreement was ratified by the Congress of the United States on February 28, 1877 (19 Stat. 254); that at all
437 times between September 10, 1876 and July 21, 1880, the said lands were a part and parcel of the Great Sioux Indian Reservation, and by reason thereof were withdrawn from and were never subject to acquisition under the provisions of the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870; that by the Act of March 2, 1899, the said lands were restored to the public domain subject to acquisition only under the homestead and townsite laws of your plaintiff; that at the time of the said approval or patenting of the said lands and all of them, the said lands were subject to acquisition only under the homestead laws of your plaintiff, and they were not subject to and have never become subject to acquisition under the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870.

"That certain of said lands which were so approved or patented in error and mistake were all of the said lands set forth and described in Tabulation D of Exhibit EE hereof, the said lands being situate in North Dakota in the indemnity limits as now laid down of the Northern Pacific land grant, which lands were, under and in pursuance of agreement of September 26, 1876, between your plaintiff and the Indians, parties thereto, which agreement was ratified by the Congress of the United States on February 28, 1877 (19 Stat. 254), withdrawn for and reserved as a part and parcel of the Great Sioux Indian Reservation; that the said lands were so withdrawn and reserved prior to the acquisition of any title or interest therein by any of the defendants in this suit; that neither at the time of said withdrawal nor since has a deficiency in the acreage of the said land grant under the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, been ascertained by the Secretary of the Interior; that subsequent to the said withdrawal the said lands were by Act of Congress of March 2, 1899, restored to the public domain and made subject to acquisition only under the homestead and townsite laws of your plaintiff; that at the time of the approval or patenting of the said lands they
438 were subject to acquisition only under the homestead laws of your plaintiff and they were not subject to and have never become subject to acquisition under the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870.

"That certain of said lands which were so approved or patented in error and mistake were all of the primary lands described in Tabulation B of Exhibit EE hereof; that the route

of the Northern Pacific railroad was definitely located opposite the said lands, and on July 7, 1882, the map of definite location covering the said route was filed with the plaintiff herein; that on July 7, 1882, the date of the filing with your plaintiff of the said map of definite location as aforesaid, the said lands were embraced in and were a part and parcel of the Flathead Indian Reservation in Montana, having been withdrawn therefor and included therein in pursuance of the terms of a treaty entered into between your plaintiff and the Flathead Indians, under date of July 16, 1855; that at all times between July 16, 1855, and July 8, 1882, the said lands were a part and parcel of the Flathead Indian Reservation, and by reason thereof were withdrawn from and were never subject to acquisition under the provisions of the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870.

"That certain of said lands which were so approved or patented in error and mistake were all of the lands set forth and described in Tabulation E of Exhibit EE hereof, the said lands being within the State of Washington and within the indemnity limits as now laid down of the Northern Pacific land grant, which lands were, under and in pursuance of a certain treaty dated June 9, 1835, between your plaintiff and certain confederated tribes known as the Yakima Indians, withdrawn for and reserved as a part and parcel of the reservation provided for by the said treaty for the said Yakima Indians; that the said lands were so withdrawn and reserved prior to the acquisition
439 of any title or interest therein by any of the defendants in this suit; that neither at the time of the withdrawal of said lands nor since has a deficiency in the acreage of the said land grant under the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, been ascertained by the Secretary of the Interior; that subsequent to the said withdrawal, the said lands were by Act of Congress of December 21, 1904, made subject to acquisition only under the homestead and settlement laws of your plaintiff; that at the time of the approval or patenting of the said lands, they were subject only to acquisition under the homestead and settlement laws of your plaintiff and they were not subject to and have never become subject to acquisition under the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870.

"That certain of said primary lands which were so approved or patented in error and mistake were all of the said primary lands described in Tabulation C of Exhibit EE hereof, the said lands being situate in Minnesota; that the route of the Northern Pacific railroad was definitely located opposite the said lands,

and on December 21, 1871, the map of definite location covering the said route was filed with the plaintiff herein; that on December 21, 1871, the date of the filing with your plaintiff of the said map of definite location as aforesaid, certain of said lands, more fully described in Tabulation C of Exhibit EE, were excepted from the operation of the said Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, by reason of having been included respectively in a previous general route withdrawal made May 5, 1864, and/or an indemnity withdrawal made December 11, 1866, by your plaintiff for the benefit of the Lake Superior and Mississippi Railroad Company; and certain other of the said lands more fully described in Tabulation C of Exhibit EE were on the said date of the said definite location of December 21, 1871, embraced in and covered by certain outstanding script which was not cancelled until September 15, 1873; that all of said lands set forth on Tabulation C of
440 Exhibit EE were excepted from the said Northern Pacific land grant on the date of the filing of the said map of definite location of December 21, 1871, and the said lands never became subject to acquisition under the provisions of the said Act of July 2, 1864, as modified and supplemented by the said Joint Resolution of May 31, 1870.

"That the approval or patenting by your plaintiff to the said Northern Pacific Railroad Company or the said Northern Pacific Railway Company of any and all of the said lands described by the various tabulations of Exhibit EE was without authority of law, and said approval or patenting was and is void; that upon the issuance by the United States of the said patents or the approvals as aforesaid, the said Northern Pacific Railway Company and/or its predecessors in interest assumed a complete ownership of said lands and all of them including the right of possession thereof and including the right to lease and otherwise deal with the said lands and to sell the said lands to third persons; that notwithstanding that said lands and each and all of them were wrongfully obtained from the United States by the said Northern Pacific Railway Company and/or its predecessors in interest, the said lands have never been reconveyed to the plaintiff herein, but to the contrary extensive areas of the said lands have been sold to third persons by the said Northern Pacific Railway Company and/or its predecessors in interest, and extensive areas of the said lands have been retained by the said Northern Pacific Railway Company for its own use and benefit notwithstanding that at all times mentioned herein the said lands and all of them were the property of the United States; that large sums of money have been received by the said Northern Pa-

cific Railway Company and/or its predecessors in interest through sales and leases and from other revenues from the said lands, all of which moneys rightfully belong to your plaintiff."

3. That the plaintiff may amend its bill of complaint (a) by striking from line 4 of page 85 of said bill the word and
441 numeral "and XXIX" and substituting in lieu thereof the word and numerals "XXIX and XXIX-A;" (b) by adding thereto in line 18 on page 96 the numeral "XXIX-A" following the numeral "XXIX" as it appears in said line; and (c) by striking therefrom the letter "P" as it appears in line 20 on page 93 of said bill and substituting the letters "DD" therefor.

4. That the filing of this stipulation shall constitute a sufficient filing of said amendments subject to the approval and order of the Court with reference to the form and manner in which said amendments shall be attached to or incorporated in said bill of complaint, and the bill of complaint as thus amended shall constitute the bill of complaint herein.

5. That in stipulating that these amendments may be made, plaintiff consents that defendants severally may move to strike all or any portion of said amendments or Exhibits DD and EE or make any other motion with respect thereto, and may have thirty days from the filing of this stipulation within which to amend and/or supplement their respective answers, or to file new amended and/or supplemental answers. Defendant Northern Pacific Railway Company may file an amended and/or supplemental answer without attaching thereto its Exhibits, but shall file said exhibits as soon as possible thereafter. The plaintiff may have thirty days after the filing of the said exhibits with the said answers as amended and/or supplemented, or with the new amended and/or supplemental answers, in which to file new and/or amended replies thereto, or to make any motion it may desire with respect to the said answers and/or the said exhibits.

Th stipuation shall not constitute any waiver of the pro-
442 visions of the stipulation between the parties, dated August 11, 1930.

Dated June 4, 1931.

United States of America, Plaintiff, by Seth W. Richardson, Assistant Attorney General; Roy C. Fox, United States Attorney for the Eastern District of Washington, Northern Division; D. F. McGowan, Special Assistant to the Attorney General; E. E. Danly, Special Assistant to the Attorney General; Northern Pacific Railway Company and Northwestern Improvement Company, by Grafton Mason, D. F. Lyons, D. R. Frost, Its Attorneys; Bankers Trust Company, by White &

Case, E. J. Cannon, Its Attorneys; Guaranty Trust Company, by Grafton Mason, D. F. Lyons, D. R. Frost, Its Attorneys; City Bank Farmers Trust Company, defendants, by Taylor Blanc, Capron & Marsh, E. J. Cannon, Its Attorneys.

443 In United States District Court

Order approving stipulation

Filed June 25, 1931

The stipulation covering certain amendments to plaintiff's bill of complaint in the above entitled action, which said stipulation bears date of June 4, 1931, is hereby allowed and approved.

Dated at Spokane, Washington, this 25th day of June 1931.

J. STANLEY WEBSTER,
United States District Judge.

[File endorsement omitted.]

444 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Amended and supplemental answer of Northern Pacific Railway Company

Filed July 18, 1931

Now comes the defendant, Northern Pacific Railway Company, and for its separate amended and supplemental answer to the bill of complaint herein says;

I

The facts alleged in the bill of complaint are insufficient to constitute any valid cause of action in equity, save for the expropriation of indemnity lands in national forests and other government reservations.

Defendant prays that all of said bill of complaint be dismissed except subdivisions I, II, III, V, the first two paragraphs of IX, the third paragraph of X, XVI, XVII, XX, XXI, XXXVII, and the first subparagraph of paragraph (1) of subdivision XLII.

II

A. Plaintiff is estopped to question or complain of any of the matters or things set forth in the bill of complaint, or to demand

any of the relief prayed for in said bill, except the expropriation of lands and determination of amount of compensation due defendant, for the reason that plaintiff is guilty of laches appearing on the face of the bill and for the reason that: More than half a century has passed since most of the matters complained of in subdivisions VI to XVIII, inclusive, are alleged to have taken place, and every man having actual knowledge of the facts alleged in subdivisions VI to XVII, inclusive, is dead. Plaintiff has had notice of most of the facts for more than fifty years and of all of them for more than thirty years. Most of said facts were made known to the Congress of the United States and to responsible executive officers of the United States more
445 than half a century ago; but prior to the commencement of this suit no proceedings were ever initiated by the plaintiff in court or otherwise to enforce any right or claim based on those facts, or any of them, and plaintiff has dealt with and concerning this defendant, and the defendant Northern Pacific Railroad Company, through a long period of years, in a manner inconsistent with the assertion of any claim or right because of such facts, or any of them. The Northern Pacific Railroad Company built a railroad and telegraph line from Lake Superior to Puget Sound and to Portland, Oregon, pursuant to the Act of July 2, 1864, and the Joint Resolution of May 31, 1870. Said railroad and telegraph line was duly examined by Commissioners and accepted by the President of the United States as provided in Section 4 of said Act more than forty years ago. From 1865 to 1896 the plaintiff dealt with and treated the Northern Pacific Railroad Company as the corporation created by said Act, and ever since 1876, pursuant to various acts of Congress, plaintiff has required the Northern Pacific Railroad Company and the Northern Pacific Railway Company to transport mails, troops, and property of the United States on said line of railroad at reduced rates as provided in Section 11 of said Act. The total amount of deductions from freight, passenger, and mail tariff rates so required to be made, down to and including the calendar year 1929, was more than $17,000,000, and for the past five years the annual deduction so made has averaged $500,000. For more than a third of a century from time to time and many times, the United States has brought suits in equity against the Northern Pacific Railroad Company and the Northern Pacific Railway Company in the courts of the United States, and has uniformly alleged that the Northern Pacific Railroad Company was duly organized and existed under and by virtue of the Act of July 2, 1864, and in those cases in which the Northern Pacific Railway Company was made a party defendant, that the North-

ern Pacific Railway Company duly succeeded to all the right, title, and interest of the Northern Pacific Railroad Company in and to the land grants made to it by the United States, and in such suits has alleged and stipulated that the Northern Pacific Railroad Company built the railroad and telegraph line authorized by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, and has often alleged that said railroad and telegraph line was accepted by the United States as provided in said Act of July 2, 1864, and never has plaintiff questioned in any court the due organization or existence of the Northern Pacific Railroad Company or the due successorship of the Northern Pacific Railway Company to the rights of the Northern Pacific Railroad in and to the land grants made to it by plaintiff. The Congress of the United States has passed a number of acts which have recognized the Northern Pacific Railroad Company as the Federal corporation contemplated by the Act of July 2, 1864, and a number of acts which recognized the Northern Pacific Railway Company as successor in interest to the Northern Pacific Railroad Company, and has accepted the railroad and telegraph line built by the Northern Pacific Railroad Company as a compliance with the terms of the Act of July 2, 1864, and has passed acts imposing burdens on the Northern Pacific Railroad Company as the company created by said Act. Said acts of Congress are these:

(1) Act of July 15, 1870, 16 Stat. 291, 305, requiring the Northern Pacific Railroad Company to pay survey fees to the plaintiff.

446 (2) Act of July 10, 1882, 22 Stat. 157, accepting and ratifying an agreement with the Crow Indians for the sale of a portion of their reservation in the territory of Montana needed for the use of the Northern Pacific Railroad Company and requiring the Railroad Company to pay to the Treasurer of the United States the sum of $25,000 for the benefit of said Indians.

(3) Act of July 4, 1884, 23 Stat. 76, 89, enabling the Secretary of the Interior to pay to certain Indian tribes in Montana territory for right-of-way to the Northern Pacific Railroad Company through their reservation $16,000 previously paid to the United States by the Northern Pacific Railroad Company in part payment for said right-of-way and providing, "That nothing herein shall be construed as in anywise affecting the relation between the Government and said Railroad Company growing out of the grant of land made to said company beyond the right-of-way provided for in said agreement."

(4) Act of October 19, 1888, 25 State. 567, directly appropriating money for the transportation of public property on the Northern Pacific Railroad.

(5) Act of March 1, 1889, 25 Stat. 771, granting relief to certain settlers, who, through error, made homestead claims on lands of the Northern Pacific Railroad Company, by empowering the Secretary of the Interior to cause an exchange of lands with the Northern Pacific Railroad Company, section for section, provided the Railroad Company agreed to the exchange, and providing further in Section 3:

"That nothing contained in this act shall be taken or construed as waiving, releasing or in anywise affecting any right of the United States to forfeit any lands granted to the Northern Pacific Railroad Company by act of Congress to aid in the construction of its line of railroad, by reason of the breach of the conditions of any such grant; and any rights to any lands acquired by the Northern Pacific Railroad Company under the provisions of this act shall be taken and held subject to whatever conditions and right of forfeiture now attach to the lands which the Northern Pacific Railroad Company may give in exchange under the provisions of this act."

(6) Act of September 29, 1890, 26 Stat. 496, forfeiting the lands opposite the unconstructed road between Wallula and Portland, and forfeiting lands of all other land grant companies opposite unconstructed road; permitting persons who had purchased from the Northern Pacific Railroad Company lands previously granted to said company and by this act restored to the public domain to purchase said lands on terms therein provided and confirming a deed of conveyance by the Railroad Company to the City of Portland of a parcel of land previously granted to the Northern Pacific Railroad Company.

(7) Act of October 1, 1890, 26 Stat. 647, entitled "An act for the relief of settlers on Northern Pacific Railroad indemnity lands," which gives to certain persons who settled upon lands in the second indemnity belt of the Northern Pacific Railroad Company's grant under the homestead and preëmption laws of the United States, the right to transfer their entries from such tracts to other vacant surveyed government lands.

(8) Act of February 20, 1893, 27 Stat. 468, ratifying and confirming agreement between the Puyallup Indians and the Northern Pacific Railroad Company for right-of-way for the Cascade Branch through the Puyallup Indian Reservation, and granting the Railroad Company a right-of-way 60 feet in width through the reservation for a spur track leading off from said Cascade Branch.

447 (9) Act of March 3, 1893, 27 Stat. 612, 631, ratifying and confirming agreement with the Yakima Indians for right of way through the Yakima Reservation, and requiring the payment by Northern Pacific Railroad Company of the sum of $8,-

295.80 to the Treasurer of the United States for the use and benefit of the Indians.

(10) Act of February 26, 1895, 28 Stat. 683, providing for the examination and classification with reference to mineral or non-mineral character of lands within certain land districts within the land grant and indemnity land grant limits of the Northern Pacific Railroad Company, and containing a proviso reading as follows:

"SEC. 7. * * * Provided, That nothing contained in this Act shall be taken or construed as recognizing or confirming any grant of land or the right to any land in the said Northern Pacific Railroad Company, or as waiving or in any wise affecting any right on the part of the United States against the said Northern Pacific Railroad Company to claim a forfeiture of any land grant heretofore made to said company."

(11) Act of February 26, 1896, 29 Stat. 17, 22, appropriating money to pay commissioners appointed under the Act of February 26, 1895.

(12) Act of June 3, 1896, 29 Stat. 245, permitting persons who settled under homestead or preëmption laws on lands within the second indemnity belt of the Northern Pacific Railroad land grant in the State of Minnesota, whose entries were subsequently cancelled, to transfer their entries to other public lands.

(13) Act of June 11, 1896, 29 Stat. 413, 436, appropriating money to pay commissioners appointed under the Act of February 26, 1895.

(14) Act of July 1, 1898, 30 Stat. 597, 621, providing for the adjustment of conflicting claims with settlers on and with purchasers from the government of lands, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, and declaring:

"That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this Act, and nothing in this Act shall be construed as enlarging the quan-

tity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted."

(15) Act of March 2, 1899, 30 Stat. 993, setting apart a portion of certain lands in the State of Washington, known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainer National Park, and providing:

"SEC. 3. That upon execution and filing with the Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual Government survey, which has been or shall be made, of the United States, not reserved and to which
448 no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States."

(16) Act of March 2, 1901, 31 Stat. 950, entitled, "An Act for the relief of settlers under the public-land laws to lands within the indemnity limits of the grant to the Northern Pacific Railroad Company," and by its terms extending the provisions of the Adjustment Act of July 1, 1898, to lands in the Railroad Company's indemnity limits patented to settlers whose claims originated while the Railroad Company's selections were pending.

(17) Act of April 28, 1904, 33 Stat. 538, reading:

"That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by any Act of Congress, are hereby legalized, validated, and confirmed: Provided, That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained.

"SEC. 2. That this Act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing accepting its terms and provisions."

(18) Act of March 3, 1905, 33 Stat. 1014, reading:

"That all conveyances heretofore made by the Northern Pacific Railroad Company, or by the Northern Pacific Railway Com-

pany, of lots one, two, three, four, five, six, and seven in block six, and lots eighteen and nineteen in block five in the first addition to the third addition to railroad addition, in the city of Spokane, State of Washington, are hereby legalized, validated, and confirmed, said lands forming a part of the right of way heretofore granted by Act of Congress to the Northern Pacific Railroad Company."

(19) Act of May 17, 1906, 34 Stat. 197, extending the provisions of the Acts of July 1, 1898, and March 2, 1901, to include certain settlements and entries made "in accordance with the erroneous decision of the Land Department respecting the withdrawal on general route of the Northern Pacific Railroad between Wallula, Washington, and Portland, Oregon," and becoming effective "upon an acceptance thereof by the Northern Pacific Railway Company being filed with the Secretary of the Interior."

(20) Act of June 25, 1910, 36 Stat. 703, 739, appropriating $30,000 "to enable the Commissioner of the General Land Office to complete the examination and classification of lands within the limits of the Northern Pacific grant under the Act of July second, eighteen hundred and sixty-four, as provided in the Act of February twenty-sixth, eighteen hundred and ninety-five, such examination and classification when approved by the Secretary of the Interior to have the same force and effect as a classification by the mineral land commissioners provided for in said Act of February twenty-sixth, eighteen hundred and ninety-five,".

(21) Act of March 4, 1911, 36 Stat. 1289, 1307, making an additional appropriation for examination and classification of lands within the limits of the Northern Pacific grant as provided in the Act of February twenty-sixth, eighteen hundred and ninety-five.

(22) Act of August 26, 1912, 37 Stat. 595, 609, continuing the appropriations for examination and classification of lands in the Northern Pacific land grant as provided in the Act of February twenty-sixth, eighteen hundred and ninety-five.

(23) Act of October 22, 1913, 38 Stat. 208, 217, continuing the appropriations for examination and classification of lands in the Northern Pacific land grant as provided in the Act of February twenty-sixth, eighteen hundred and ninety-five.

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(24) Act of July 29, 1914, 38 Stat. 559, 571, continuing the appropriations for examination and classification of lands in the Northern Pacific land grant as provided in the Act of February twenty-sixth, eighteen hundred and ninety-five.

(25) Act of March 4, 1915, 38 Stat. 1138, 1148, continuing the appropriations for examination and classification of lands in the

Northern Pacific land grant as provided in the Act of February twenty-sixth, eighteen hundred and ninety-five.

(26) Act of September 8, 1916, 39 Stat. 801, 817, continuing the appropriations for examination and classification of lands in the Northern Pacific land grant as provided in the Act of February twenty-sixth, eighteen hundred and ninety-five.

(27) Act of February 27, 1917, 39 Stat. 946, entitled, "An Act For the relief of settlers on unsurveyed railroad lands" and providing:

"That where, prior to July first, nineteen hundred and thirteen, the whole or any part of an odd-numbered section within the primary limits of the land grant to the Northern Pacific Railway Company, within the State of Washington, to which the right of the grantee or its lawful successor is claimed to have attached by definite location, has been settled upon in good faith while unsurveyed, by any qualified settler, the same shall be subject to all the provisions of the Act of July first, eighteen hundred and ninety-eight."

and providing further:

"That upon the relinquishment by said railway company of any of the lands so settled upon the selection of any lieu lands of approximately equal value by said company shall be confined to the State of Washington."

(28) Act of April 17, 1917, 40 Stat. 2, 18, continuing the appropriations for examination and classification of lands in the Northern Pacific land grant as provided in the Act of February twenty-sixth, eighteen hundred and ninety-five.

(29) Act of February 28, 1919, 40 Stat. 1204, entitled, "An Act For the relief of settlers on certain railroad lands in Montana" and reading:

"That in the adjustment of the grants to the Northern Pacific Railroad Company, if any of the lands within the indemnity limits of said grants through that portion of the former reservation for the Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Indians lying south of the Missouri River in the State of Montana be found in possession of an actual bona fide qualified settler under the homestead laws of the United States who has made substantial improvements thereon and such land has been adjudged by the Secretary of the Interior to inure to the Northern Pacific Railway Company under the grants made to its predecessor in interest, the Northern Pacific Railroad Company, the Northern Pacific Railway Company upon request of the Secretary of the Interior may file a relinquishment of said lands in favor of the settler and shall then be entitled to select an equal

quantity of other lands in lieu thereof from any of the surveyed public lands within the State of Montana, not mineral and not otherwise appropriated at the date of selection, to which it shall receive title the same as though originally granted: Provided, however, That lands withdrawn or classified as coal lands may be selected by said company, and as to such lands it shall receive a restricted patent as provided by the Act of June twenty-second, nineteen hundred and ten."

(30) Act of December 15, 1921, 42 Stat. 1573, entitled, "An Act For the relief of John Cestnik, junior" and providing that the Northern Pacific Railway Company, upon filing with the Secretary of the Interior a relinquishment in favor of the United States of all title and interest in certain land in Montana, under the railway company's mineral indemnity selection, em-
450 bracing said tract, shall be entitled to select and receive a patent for other vacant unreserved non-mineral public lands of an equal area in that State, and authorizing the homestead entry of John Cestnik, junior, to remain intact after said relinquishment.

(31) Act of September 20, 1922, 42 Stat. 1710, entitled, "An Act For the relief of Israel Butts," and providing that the Northern Pacific Railway Company, upon filing a proper relinquishment disclaiming all title and interest to certain land in Minnesota, under an indemnity selection, should be entitled to receive a patent for other public lands of an equal area situate within any state into which the company's grant extends, and authorizing the homestead entry of Israel Butts to remain intact after the filing of such relinquishment.

(32) Act of February 28, 1923, 42 Stat. 1782, entitled, "An Act For the relief of Anton Rospotnik and the exchange of certain lands owned by the Northern Pacific Railway Company," and providing that the Northern Pacific Railway Company, upon filing a proper relinquishment of certain lands in the State of Montana selected by the Northern Pacific Railway Company as a mineral indemnity selection, shall be entitled to select and receive a patent for other vacant unreserved nonmineral public lands of an equal area in that state, and of approximately the same value, and permitting the homestead entry of Anton Rospotnik to be reinstated upon the filing of such relinquishment.

(33) Act of March 3, 1925, 43 Stat. 1594, entitled, "An Act For the relief of Lars O. Elstad and his assigns and the exchange of certain lands owned by the Northern Pacific Railway Company," and reading:

"That the Northern Pacific Railway Company, upon its filing with the Secretary of the Interior a proper relinquishment dis-

claiming in favor of the United States all title and interest in or to lot 5, section 13, township 140 north, range 40 west, in the Crookston, Minnesota, land district, under its place grant, shall be entitled to select and receive a patent for other vacant, unreserved, nonmineral, surveyed public lands of an equal area within any of the States through which the Northern Pacific Railway Company's land grant extends."

(34) Act of March 5, 1931, entitled, "An Act Granting to the Butte Anglers' Club, of Butte, Montana, a patent to lot 1, section 5, township 2 south, range 9 west, and a patent to the Northern Pacific Railway Company of lot 2 in said section 5."

The plaintiff has purchased from the Northern Pacific Railroad Company and from the Northern Pacific Railway Company thousands of acres of lands within the place limits and indemnity limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, and has paid large sums to the Northern Pacific Railroad Company and the Northern Pacific Railway Company for said lands. In several instances the plaintiff has acquired from the Northern Pacific Railroad Company and the Northern Pacific Railway Company, under its power of eminent domain, tracts of land within the place limits of the land grant made by the Act of July 2, 1864. Upon the request of the plaintiff, defendant Northern Pacific Railway Company on August 8, 1930, gave to the plaintiff an option to purchase certain lands in the State of Wisconsin patented to the defendant Northern Pacific Railway Company in the year 1914 in satisfaction of mineral indemnity selections made by said defendant Northern Pacific Railway Company under the Act of July 2, 1864. Every Secretary of the Interior who
451 has held office since the passage of the Act of July 2, 1864, has recognized the Northern Pacific Railroad Company as the Federal corporation created by that act and every Secretary of the Interior since 1896 has recognized the Northern Pacific Railway Company as its successor in interest.

On February 6, 1897, in answer to an inquiry from the then Secretary of the Interior with respect to the propriety of issuing patents to the Northern Pacific Railway Company, Attorney General Harmon advised said Secretary of the Interior that the conditions of the grant under the Act of July 2, 1864, had been fully performed and the right to have lands patented was perfect in the Northern Pacific Railroad Company, and that the right of the Northern Pacific Railroad Company to the lands granted passed to the Northern Pacific Railway Company under foreclosure; that the lands were already fully earned and were subject to no condition subsequent, and that the Secretary of the

Interior was not justified in refusing to issue patents to the Northern Pacific Railway Company, but should act upon applications for patents by that company upon the same considerations which would govern him in case there had been no foreclosure and the applications were made by the Northern Pacific Railroad Company. The opinion of Attorney General Harmon so given is reported in Volume 21 of Opinions of Attorneys General, page 486. Thereafter the Secretary of the Interior approved the issuance of patents to the Northern Pacific Railway Company for several million acres of lands within the place and indemnity limits of the land grants made to the Northern Pacific Railroad Company by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870.

On November 21, 1899, and again on December 26, 1899, the Secretary of the Interior rendered a decision recognizing the Northern Pacific Railway Company as the successor in interest of the Northern Pacific Railroad Company and as entitled to the land grants made to the Northern Pacific Railroad Company. Said decisions are reported in Volume 29 L. D., pages 316 and 387.

On April 12, 1905, Attorney General Moody, in answer to an inquiry from the then Secretary of the Interior, gave to said Secretary an opinion in which he held that the Northern Pacific Railway Company, by virtue of the foreclosure proceedings had in 1896 and the sale thereunder to it of all of the property, rights and franchises of the Northern Pacific Railroad Company, became the successor in interest of the latter company, and confirmed the opinion given by Attorney General Harmon February 6, 1897, and advised the Secretary that he should continue to be governed by the rule laid down in said opinion. The opinion of Attorney General Moody so given is reported in Volume 25 of Opinions of Attorneys General, page 401. Thereafter the Secretary of the Interior approved the issuance of patents to the Northern Pacific Railway Company for several million acres of lands within the place and indemnity limits of the land grants made to the Northern Pacific Railroad Company by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870.

On July 17, 1909, the Secretary of the Interior by the case of Heath v. Northern Pacific Ry. Co., reported in 38 L. D., page 77, rejected the claims of more than one thousand individuals, who in the year 1908 applied to make entry in the District Land Office at Vancouver, Washington, each of a 160-acre tract between Portland and Tacoma, basing their claims on the proviso in the Joint Resolution of May 31, 1870, relating to settlement
452 and preemption at $2.50 an acre. In so rejecting their

claims the Secretary held that the preëmption law which was in existence at the date of the grant to the Northern Pacific Railroad Company was repealed by the Act of March 3, 1891 (26 Stat. 1097). The Secretary further held:

"Congress evidently supposed that within five years after the completion of the road all of the lands granted would be surveyed and the entire matter finally settled, while in fact such has not been the case. The road was completed not later than June 10, 1888, and even at the present time the grant has not been finally adjusted and all of the lands have not been surveyed. It is too obvious for argument that the failure of the Government to survey the lands has seriously interfered with the company's ability to finally dispose of the same to advantage because, while it might have been entirely feasible to raise money upon mortgaging the inchoate, indefinite claim to lands generally, it would be wholly impracticable to sell such lands and receive therefor anything like the actual market value of the lands themselves" (p. 83).

Millions of acres of patented lands have been sold to the public by defendant and by the Northern Pacific Railroad Company in reliance upon the patents.

In reliance upon all of the facts and circumstances hereinbefore set forth that had arisen prior to November 10, 1896, defendant Northern Pacific Railway Company did on said date make its mortgage to The Mercantile Trust Company as Trustee, known as its Prior Lien Mortgage, on all of the railroad and telegraph line, rolling stock, franchises, lands and land grants acquired by it upon foreclosure sale of the properties of the Northern Pacific Railroad Company. Said mortgage specifically covered "any and all the lands granted by the Congress of the United States to aid in the construction and equipment of said railroad, * * * together with the grants of said lands and all rights under such grants, and all the estate, right, title, interest, claim and demand whatsoever which the Railway Company now has or may hereafter acquire or become entitled to, of, in and to any of the lands aforesaid, and also of, in and to all the indemnity lands, wherever the same may be situated, that have been or may be acquired by said company to supply deficiencies in the quantities of said granted or mortgaged lands in pursuance of, and in accordance with the terms and provisions of said grants."

The defendant Bankers Trust Company, by virtue of the merger of The Mercantile Trust Company into it, is now the Trustee of the Prior Lien Mortgage. Defendant Northern Pacific Railway Company issued its bonds, due 100 years thereafter, secured by said Prior Lien Mortgage and these bonds are now outstanding in the hands of the public in the sum of $107,399,600.

On November 10, 1896, defendant Northern Pacific Railway Company made to The Farmers' Loan and Trust Company, now known as City Bank Farmers Trust Company, defendant herein, as Trustee, its mortgage, known as its General Lien Mortgage, covering the same property as the Prior Lien Mortgage and issued its bonds, due 150 years thereafter, secured by said General Lien Mortgage, which bonds are now outstanding in the hands of the public in the sum of $54,551,500. Said General Lien Mortgage also has provision for issuing additional bonds sufficient to refund the said Prior Lien bonds.

Defendant Northern Pacific Railway Company, in reliance on all the facts and circumstances set forth in this paragraph that had arisen prior to July 1, 1914, made on said date its mortgage to defendant Guaranty Trust Company, as Trustee, known as its Refunding and Improvement Mortgage, covering the railroad and other properties of the Northern Pacific Railway Company other than its land grant, and issued its
453 bonds secured by said mortgage, maturing in the year 2047, which bonds are now outstanding in the hands of the public in the sum of $145,661,900.

Defendant Northern Pacific Railway Company, in reliance upon the circumstances and facts hereinbefore stated that arose prior to September 1, 1896, issued its preferred stock in the sum of $75,000,000, and common stock in the sum of $80,000,000. Said preferred stock was on January 1, 1902, retired and additional common stock issued in an equal amount. Northern Pacific Railway Company, relying on the facts and circumstances hereinbefore stated, did on January 7, 1907, make an additional issue of common stock in the sum of $93,000,000, which stock was sold at par. There are now more than 37,000 owners of stock of the Northern Pacific Railway Company, and approximately 30,000 owners of the bonds of the Northern Pacific Railway Company. These stocks and bonds are held throughout the United States and in foreign countries and are dealt with and have been dealt with for many years in the financial markets of the world.

B. By final decrees heretofore entered in several suits, as hereinafter stated, in which the parties were the United States as plaintiff and the Northern Pacific Railroad Company or the Northern Pacific Railway Company, or both, as defendants, plaintiff is estopped to claim that the Northern Pacific Railroad Company was not duly organized under the Act of July 2, 1864, or that the Northern Pacific Railroad Company did not build the railroad and telegraph line authorized by said Act and the Joint Resolution of May 31, 1870, or that said railroad and telegraph line was not accepted by the United States as provided in said Act of July 2, 1864, or that the Northern Pacific Railroad Com-

pany did not own and operate said railroad and telegraph line from its construction until the receivership proceedings begun in 1893, or that the Northern Pacific Railway Company is not the successor in interest to the Northern Pacific Railroad Company by purchase at a valid foreclosure sale of said railroad and telegraph line and of the land grants made to the Northern Pacific Railroad Company and of all other properties of said Northern Pacific Railroad Company. All of these matters were at issue, were material and were adjudicated. These suits and the decrees therein are as follows:

On the third day of September, 1897, in the Circuit Court of the United States, in and for the District of Minnesota, Fifth Division, this plaintiff filed its bill in equity signed by Joseph McKenna, Attorney General, entitled, "The United States of America, Complainant, vs. The Northern Pacific Railroad Company, a corporation: The Northern Pacific Railway Company, a corporation, and Edwin H. McHenry and Frank G. Bigelow, as Receivers of The Northern Pacific Railroad Company, Defendanat," in which bill as amended the plaintiff alleged:

"That the defendant the Northern Pacific Railroad Company is and was at all the times hereinafter stated a railroad corporation duly created, organized, and existing under a certain act of Congress entitled 'An Act Granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the northern route' approved July 2nd, 1864, and the Acts amendatory thereof and supplemental thereto, and having its principal place of business in the city of Saint Paul, County of Ramsey, and State of Minnesota."

In said bill of complaint the plaintiff set out the provisions of said Act of July 2, 1864, relating to the grant of lands to the Northern Pacific Railroad Company, its successors and assigns,

454 and alleged that the City of Duluth was the eastern terminus or eastern initial point of the grant to the Northern Pacific Railroad Company, and that a certain tract of land therein described was, prior to the 22nd day of April, 1895, a part of the public domain of the United States lying and being more than ten miles east of the aforesaid eastern terminus and without the limits of the grant to said Northern Pacific Railroad Company under said Act of July 2nd, 1864, and alleged further than on the 22nd day of April, 1895, ministerial officers of the United States through inadvertence and mistake conveyed by patent the described tract of land to the Northern Pacific Railroad Company under the erroneous impression and mistaken belief that said tract of land lay within the limits of the aforesaid grant and plaintiff prayed that said tract of land be restored

to the plaintiff. Defendant Northern Pacific Railroad Company, in the joint answer filed by it and the Receivers of the Northern Pacific Railroad Company, admitted that it was then and at all times mentioned in the bill of complaint had been a railroad corporation created, organized and existed under the Act of July 2, 1864. The case was tried on an agreed statement of facts made on the 28th day of October, 1898, in which the parties stipulated:

"That the defendant, The Northern Pacific Railroad Company, is a corporation created, organized, and existing under and by virtue of an act of congress approved July 2, 1864, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route,' and the acts and joint resolutions of congress supplemental thereto and amendatory thereof."

In said agreed statement it was further stipulated that the Northern Pacific Railroad Company constructed its line of railroad from Ashland, Wisconsin, to Wallula Junction, in the State of Washington, and from a point sixteen miles north of Wallula Junction over and across the Cascade Mountains to the City of Tacoma, in the State of Washington, and from Tacoma to Portland, in the State of Oregon, and that the whole of said line of railroad was accepted by the President of the United States as provided in said Act of Congress of July 2, 1864. After trial and argument a decree was entered on the 20th day of February, 1899, by which it was ordered, adjudged, and decreed that the bill of complaint of the complainant be dismissed for want of equity. Thereafter an appeal from said decree was taken by the United States to the Circuit Court of Appeals of the Eighth Judicial Circuit and the decree below was affirmed in a decision made on the 10th day of July, 1899, reported in 95 Federal Reporter, page 864. Thereafter an appeal was taken by the United States from the decree of the Circuit Court of Appeals to the Supreme Court of the United States and the decree of the Circuit Court of Appeals was affirmed in a decision made on the 16th day of April 1900, and reported in Volume 177 U. S., page 435.

On the 27th day of July 1897, the plaintiff herein filed in the Circuit Court of the United States for the District of Washington, Western Division, a bill of complaint signed by Joseph McKenna, Attorney General, entitled, "The United States of America, Plaintiff, vs. The Northern Pacific Railroad Company, and the Northern Pacific Railway Company, Defendants", wherein it was alleged "that the defendant, the Northern Pacific Railroad Company, is a corporation organized and existing under and by virtue of an Act of Congress, approved on the 2d day of July 1864, entitled 'An Act granting lands to aid in the construction

of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern Route'"; that certain tracts of land situated in the Western Division of
455 the District of Washington comprising several thousand acres were owned by the United States on the 24th day of May 1895, and on the 27th day of May 1895; that in a certain suit begun in the Circuit Court of the United States, for the Eastern District of Wisconsin, wherein the Farmers' Loan and Trust Company, of New York, was plaintiff, and the Northern Pacific Railroad Company and others were defendants, the court "having then full and competent jurisdiction in the premises, proceeded to foreclose a certain mortgage against the said Northern Pacific Railroad Company, and thereafter, and during the pendency of said action, an ancillary bill was filed and subsequent proceedings were had in the same case in the Circuit Court of the United States, for the District of Washington, and in the Northern Division thereof, in which said proceedings the said Circuit Court for the District of Washington, and the Northern Division thereof, having full power in the premises, did, on or about the 25th day of July, 1895, order, direct, and decree that all of the interest of the said Northern Pacific Railroad Company in the above described, and other lands, be sold to satisfy the said mortgage and other indebtedness of said company, and that the said lands were sold to the Northern Pacific Railway Company."

and it was further alleged in said bill of complaint that the Northern Pacific Railway Company had acquired the said lands as the successor in interest of the said Northern Pacific Railroad Company, if they had acquired the same, and that the Northern Pacific Railway Company held the same by reason of purchase at a public sale held at the City of Seattle, in the State of Washington, under and by virtue of a decree of the said courts dated the 3rd day of August, 1895; that the said lands so acquired were held by the Railway Company under said decrees and by reason of the said sale as successor of the said Northern Pacific Railroad Company; and that patents to said lands were erroneously issued to the Northern Pacific Railroad Company as a part of its land grant. It was prayed that the patents so erroneously issued be cancelled and set aside. An agreed statement of facts was entered into by the parties and filed in the suit on the 12th day of May, 1900. Said agreed statement was signed by John W. Griggs, Attorney-General of the United States. In said stipulation the parties agreed:

"That at all the times hereinafter mentioned the Northern Pacific Railroad Company was a corporation, organized, created and existing under and by virtue of an act of Congress, approved

July 2, 1864, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route.' * * *

"That prior to the year 1875, the Northern Pacific Railroad Company completed the construction of that portion of its road extending from Kalama to Tacoma, upon the line of definite location thereof; and thereupon the President of the United States appointed commissioners to examine that portion of said road, and said commissioners duly reported that the same had been constructed in a good, substantial and workmanlike manner, in all respects as required by the act making the grant; and thereupon, to wit, on the first day of January, 1875, the President of the United States approved the report of said commissioners and accepted said portion of said road, as required by the act making the grant.

"That thereafter said Northern Pacific Railroad Company completed the construction of that portion of said road extending from Kalama, in the then Territory of Washington, to the city of Portland, in the State of Oregon; that said portion of said road was constructed upon said line of definite location; and thereupon the President of the United States appointed commissioners to examine said portion of said road, and said commissioners duly reported that the same had been constructed in a good, substantial and workmanlike manner, in all respects, as required by the act making the grant; and thereupon, and on October 5, 1883, the President of the United States duly
456 approved the report of said commissioners and accepted said portion of said road, as required by the act making the grant. * * *

"That on or about the 23d and 27th days of May, 1895, the United States issued and delivered to the Northern Pacific Railroad Company letters patent, in due form of law, conveying to said Northern Pacific Railroad Company the legal title to all the lands described in the bill of complaint and involved in this suit. * * *

"That the decree of the Circuit Court of the United States for the Eastern District of Wisconsin, and of the Circuit Court of the United States for the District of Washington, alleged in the bill and admitted in the answer thereto, was rendered in a suit of equity, instituted by the Farmer's Loan and Trust Company, for the purpose of foreclosing three certain mortgages, executed and delivered by the said Northern Pacific Railroad Company, upon certain property of said company, including the lands described in the bill of complaint, under said decree, and by virtue of certain deeds of conveyance, executed in pursuance of said

decree, the Northern Pacif Railway Company acquired all the interest of the Northern Pacific Railroad Company in and to those lands described in the bill of complaint, which, at the date of said sale, were undisposed of by said Northern Pacific Railroad Company, by virtue of sales, contracts and deeds as hereinafter set forth."

On the 1st day of August, 1901, after trial and argument of said cause a decree was entered, ordering, adjudging and decreeing that the bill of complaint of the complainant be dismissed for want of equity. Thereafter an appeal was taken by the United States to the Circuit Court of Appeals for the Ninth Circuit, which court certified to the Supreme Court of the United States certain questions on which it desired instructions. Thereafter the whole record and cause were required to be sent up to the United States Supreme Court for consideration, and in that court, by a decision made on the 23rd day of February, 1904, and reported in Volume 193 U. S., 1, the decree of the Circuit Court was affirmed. In said decision the court held:

"The line east of Portland provided for in the act of 1864 formed nearly a right angle at Portland with the line from there to Puget Sound provided for in the joint resolution, and thus the two grants overlapped, and the lands in suit fell within the overlap.

"But the line down the Columbia from Wallula to Portland was never built and the grant was forefeited September 29, 1890, 26 Stat. 496, c. 1040, while the line from Portland to Puget Sound and east across the Cascade Mountains was built and the grants earned" (p. 6).

On the 5th day of March, 1907, the plaintiff herein filed in the Circuit Court of the United States for the Eastern District of Washington a bill of complaint signed by Charles J. Bonaparte, Attorney General, entitled The United States of America, Complainant, vs. Northern Pacific Railway Company, et al, Defendants, wherein it was sought to cancel patents for lands issued to the the Northern Pacific Railroad Company and the Northern Pacific Railway Company within the Yakima Indian Reservation upon the alleged erroneous and mistaken belief that said lands were included within the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, and were outside of said reservation. In said bill of complaint it was alleged:

"That said defendant, Northern Pacific Railway Company, did, on or about the 1st day of September, 1896 by transfer and conveyance, become the successor in interest in and to all of the property, rights and interests of the Northern Pacific Railroad Company, a corporation organized and existing under and by

virtue of an Act of Congress passed July 2, 1864 (13 Stats. 365), and entitled, 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern route.' That the property rights and interest so transferred and conveyed by said last-named corporation to said defendant, Northern Pacific
457 Railway Company, included all rights to the public lands granted, or to be granted, by the United States to said Northern Pacific Railroad Company under and by the terms of said Act of Congress, and, in terms, all lands for which patents had been theretofore issued to said corporation by the United States, said last mentioned lands being described in Exhibit 'A', hereto annexed, as having been patented prior to September 1, 1896."

In answer to said bill of complaint, defendant Northern Pacific Railway Company admitted that it became on or about the first day of September, 1896, as alleged, successor in interest to all the property, rights, and interest of the Northern Pacific Railroad Company, a corporation under the Act of Congress of July 2, 1864; and that among said property and rights were the public lands granted and to be granted by the United States under the said Act of Congress and amendments thereto.

In the answer of the Northern Pacific Railroad Company it was admitted that defendant Northern Pacific Railroad Company was a corporation organized and existing under and by virtue of the Act of July 2, 1864. At the trial of said suit it was stipulated by the parties thereto:

"that the Northern Pacific Railroad Company was duly organized and created as a corporation on the 2d day of July, 1864, by Act of Congress for the purpose of building and operating a railroad through the states and territories lying between said points, including the territory of Washington. That the Northern Pacific Railway Company is the lawful successor in interest of the Northern Pacific Railroad Company."

On the 25th day of September, 1909, a decree was entered in said suit cancelling some of said patents and holding that the United States was the owner of and entitled to the possession of the land covered by said patents subject to the rights of the Yakima Indians. Said case was subsequently appealed to the Circuit Court of Appeals of the Ninth Circuit and there affirmed. An appeal was taken from the decree of the Circuit Court of Appeals to the Supreme Court of the United States, and that court by decision dated February 24, 1913, reported in Volume 227 U. S., page 355, affirmed said decree. In its decision the Supreme Court held:

"There is no question made of the title of the railroad and railway companies or of their respective vendees other than as the lands fall within or without the reservation. If they were within the boundaries of the reservation they were lands of the Indians; otherwise, public lands of the United States and passed to the companies, respectively, under the act of Congress and the patents issued in pursuance thereof" (p. 356).

On the 5th day of June, 1915, plaintiff herein filed a bill of complaint in the District Court of the United States in and for the District of Montana signed by T. W. Gregory, Attorney General, entitled, "United States of America, Complainant, vs. Northern Pacific Railway Company, a corporation, Defendant", wherein it was sought to have cancelled certain patents to lands within the Gallatin Forest Reserve, which lands, it was alleged, were erroneously patented to the Northern Pacific Railway Company. In said bill of complaint plaintiff alleged:

"I

"That the defendant Northern Pacific Railway Company is now, and at all of the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin.

"II

"That the Northern Pacific Railroad Company was a corporation organized and existing under and by virtue of the Act of Congress of the United States, approved July 2,
458 1864, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route (13 Stats. 365).

"III

"That the said defendant Northern Pacific Railway Company is the assignee and successor in interest of the said Northern Pacific Railroad Company, of, in and to all properties, lands, rights, grants, privileges and franchises granted to said Northern Pacific Railroad Company by the aforesaid Act of Congress approved July 2, 1864, and by all acts supplemental thereto and amendatory thereof."

Defendant Northern Pacific Railway Company in its answer to said bill of complaint admitted that the defendant was a corporation and assignee and successor in interest of the Northern

Pacific Railroad Company of, in and to all properties, lands, rights, grants, privileges and franchises granted to the Northern Pacific Railroad Company by Act of Congress approved July 2, 1864, as alleged in the bill. The cause came on for hearing on the bill of complaint, answer and statement of agreed facts, and by decree entered on November 21, 1918, it was ordered, adjudged and decreed that the bill of complaint be dismissed. An appeal was taken from said decree to the Circuit Court of Appeals of the Ninth Circuit, wherein said decree was affirmed. Subsequently an appeal was taken from the decree of the Circuit Court of Appeals to the Supreme Court of the United States. The decision of the Supreme Court is reported in 256 U. S., page 51. The court said:

"The lands in question are within the indemnity limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365, as modified and supplemented by the joint resolution of May 31, 1870, 16 Stat. 378, and were selected and patented as indemnity for lands lost within the place limits. The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other (p. 58).

"The company duly accepted the terms of the grant, filed appropriate maps of the general route, afterwards definitely located the line in the mode prescribed, and constructed and completed the road from Ashland, Wisconsin, on Lake Superior, to Tacoma, Washington, on Puget Sound, and thence to Portland, Oregon, its full length being more than 2,000 miles. The definite location was completed in 1884 and the construction in 1887. The road as completed was examined and favorably reported by the commissioners and accepted by the President. Reports of Commissioner of Railroads—for 1885, p. 22; 1886, p. 36; 1887, p. 24; 1888, p. 24; Doherty v. Northern Pacific Ry. Co., 177 U. S. 421; United States v. Northern Pacific R. R. Co., 95 Fed. Rep. 864; s. c. 177 U. S. 435; United States v. Northern Pacific R. R. Co., 193 U. S. 1" (p. 60).

The court held that if there was a deficiency in the grant the Railway Company was entitled to a decree and remanded the case to the District Court with directions for further proceedings to determine that question.

Without waiving any of the defenses on points of law in this answer set forth defendant says:

III

Answering subdivisions I, II and III of the bill of complaint it admits that this suit arises under the laws of the United States and that the amount involved is more than $100,000.

Admits that the Northern Pacific Railroad Company is a Federal corporation organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365), and has an office
459. in the City of New York. Denies that the Northern Pacific Railroad Company is engaged in business.

Denies that there is now or ever has been a Northern Pacific Railroad Company other than the Northern Pacific Railroad Company referred to in the first paragraph of subdivision II of the bill of complaint, and organized and existing under the Act of July 2, 1864. The facts in regard to the reorganization of 1875 are hereinafter alleged.

Admits that this defendant is a corporation organized under the laws of the State of Wisconsin and that it has its general offices at St. Paul, Minnesota.

Admits that Northwestern Improvement Company is a corporation organized and existing under the laws of the State of New Jersey and has an office in New York City. Alleges that its principal place of business is St. Paul, Minnesota.

Admits that Bankers Trust Company, Guaranty Trust Company, and City Bank Farmers Trust Company are corporations organized and existing under the laws of the State of New York and that they have their principal places of business in New York City. Defendant re-alleges that part of paragraph II A of this answer beginning at line 13, page 9, and ending with line 2, page 10.

Admits that certain portions of the Act of July 2, 1864, are summarized in subdivision III with substantial accuracy, save that in said Act it was enacted that Richard D. Rice and 133 other individuals named in the Act, and all such other persons who should or might be associated with them, and their successors, should thereby be created and erected into a body corporate by the name of the "Northern Pacific Railroad Company", and by that name should have perpetual succession, and the corporation so created was authorized to construct a described line of railroad. For a complete and accurate statement of the Act of July 2, 1864, and the purpose thereof, defendant begs to refer to the Act itself.

Admits the Act of July 2, 1864, makes a grant of lands for the purpose of aiding in the construction of a railroad and telegraph line to the Pacific Coast and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores.

Admits that that part of Section 3 of the Act of July 2, 1864, which is set forth in said subdivision III, is accurately quoted.

Alleges that Section 4 of the Act of July 2, 1864, reads as follows:

"And be it further enacted, That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: Provided, That not more than ten sections of land per mile, as said road shall
460 be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota; Provided, also, That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act."

Admits that the Act of July 2, 1864, provides for a right-of-way and alleges that Section 2 of the Act grants a right-of-way in the following terms:

"And be it further enacted, That the right-of-way through the public lands be, and the same is hereby, granted to said 'Northern Pacific Railroad Company,' its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad

where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, sidetracks, turntables, and water stations; and the right-of-way shall be exempt from taxation within the territories of the United States."

Admits that Section 8 of the Act provided that the company should commence the work within two years from its approval and complete the whole road by the 4th day of July 1876.

Admits that Section 10 of the Act provided that no mortgage or construction bonds should be issued by the company on the road, or mortgage or lien made in any way except by the consent of the Congress. Admits that Section 20 of the Act is correctly set forth.

Admits that Congress adopted the Resolution of May 7, 1866, extending the time for commencing and completing the Northern Pacific Railroad, but denies that the resolution purports to be a modification of the Act of July 2, 1864, and begs to refer to the language of the Resolution for an accurate statement of its terms and purposes. Admits that the Resolution of July 1, 1868, reads as set forth.

Admits that the Resolution of March 1, 1869, grants the consent of Congress provided for in Section 10 of the Act of July 2, 1864, to the issuance by the Northern Pacific Railroad Company of bonds secured by mortgage upon its railroad and telegraph line for the purpose of raising funds with which to construct its railroad and telegraph line. Denies that said Resolution purports to be a modification of the Act of July 2, 1864, and begs to refer to the Resolution itself for a statement of its terms.

Admits that the Resolution of April 10, 1869, authorized the Northern Pacific Railroad Company to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound. Alleges that the Resolution does not purport to be a modification of the Act of July 2, 1864, and begs to refer to the Resolution itself for an accurate statement of its terms and purposes. Alleges that the Northern Pacific Railroad Company took no action under this Resolution and did not accept it in any form.

Admits that the Joint Resolution of May 31, 1870, is correctly set forth, but denies that said Joint Resolution purports to be a modification of the Act of July 2, 1864.

IV

Denies the correctness of the conclusions set forth in subdivision IV and begs to refer to the Act of July 2, 1864, for a correct statement of its terms and provisions.

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V

Denies each allegation of subdivision V. Alleges that the Northern Pacific Railroad Company accepted the Act of July 2, 1864, in the manner required by said Act. Admission of service on notice of acceptance was made by President Abraham Lincoln on the 29th day of December 1864.

VI

The facts as to the matters set forth in subdivision VI are these:

Between October 1, 1864, and December 1, 1864, 20,075 shares of the stock of the Northern Pacific Railroad Company were in good faith subscribed for and $10 per share actually paid thereon to the Treasurer of the Board of Commissioners of the Northern Pacific Railroad Company, and the sums of money so received were, on or before the 8th day of December, 1864, transferred to the credit of the Northern Pacific Railroad Company. On December 6, 1864, the subscribers to said stock elected a Board of Directors. On December 7, 1864, the Board of Directors elected Josiah Perham, President; Philander Reed, Vice President; Charles S. Perham, Secretary; and I. S. Withington, Treasurer. On January 5, 1866, Josiah Perham resigned as President and J. Gregory Smith was elected in his stead. On February 2, 1870, pursuant to a resolution of the Board of Directors adopted on the 16th day of January 1866, said 20,075 shares of stock were declared forfeited by resolution of the Board of Directors for failure to pay an assessment of 90 per cent made on said stock.

Save as aforesaid, defendant denies each and every allegation in subdivision VI contained.

VII

The facts as to the matters set forth in subdivision VII are these:

In the month of December 1865, the Northern Pacific Railroad Company issued 6,000 shares of its capital stock of the par value of $100 per share to a large number of individuals, of whom Josiah Perham was one. Said 6,000 shares of capital stock were issued in payment of claims against the Northern Pacific Railroad Company duly allowed to the amount of $600,000 by the Board of Directors of said company. Defendant denies that the Act of July 2, 1864, required the payment of the sum of $100 for each share of stock issued, and for a correct statement of the requirements of said Act with relation to the issuance

of stock, defendant begs leave to refer to the Act itself. During the years 1870 to 1874 inclusive, the company purchased and retired said 6,000 shares of stock.

VIII

Alleges that it has not in its possession either the agreement of January 10, 1867, or the supplemental agreement of July 31, 1867, referred to in subdivision VIII, nor has it any information as to the whereabouts of said agreements, but admits that it has in its possession what purport to be true copies of said agreements, and admits that Exhibit A attached to the bill of complaint is substantially identical with the copy of the agreement of January 10, 1867, which this defendant has in its possession, and admits that Exhibit B is substantially identical with the copy of the supplemental agreement of July 31, 1867, which this defendant has in its possession. Defendant believes said agreements were executed, though it has no knowledge
462 thereof save as above set forth. Denies that said agreements or either of them was fraudulent or illegal.

Admits that on the 20th day of May 1869 an agreement was entered into between the Northern Pacific Railroad Company and Jay Cooke & Company and that Exhibit C attached to said bill of complaint is a substantially accurate copy of said agreement. Admits that on January 1, 1870, an agreement was entered into between the Northern Pacific Railroad Company and Jay Cooke & Company and admits that Exhibit D attached to said bill of complaint is a substantially accurate copy of said agreement. Denies that said agreements or either of them was fraudulent or illegal.

Denies that prior to January 1, 1875, 299,526 shares of common stock had been issued by the Northern Pacific Railroad Company, but admits that 254,976 shares of common stock had been issued and that 44,550 shares were due to be issued but had not been issued, making a total of 299,526 shares. Denies that said stock or any thereof was issued in violation of law.

It has no knowledge as to the consideration received by the Northern Pacific Railroad Company on the issuance of its common stock prior to January 1, 1875, except as is contained in such records of the Northern Pacific Railroad Company as are now in existence and in defendant's possession; alleges that the consideration paid for said common stock was what is shown in preceding paragraphs of this answer and in the various agreements referred to in subdivision VIII of the bill of complaint.

Denies that the issuance of stock under and pursuant to said agreements of May 20, 1869, and January 1, 1870, delayed the

construction of the railroad authorized by said Act of July 2, 1864, and the Joint Resolution of May 31, 1870. Alleges that it was wholly impossible to sell the stock to the general public or at all and alleges the fact to be that said agreements made it possible to construct and brought about the construction considerable sections of the railroad, and no other method of financing the construction of the railroad was available.

Save as aforesaid, defendant denies each and every allegation in subdivision VIII contained.

IX

Admits that at the instance of Jay Cooke & Company and other representatives of the Northern Pacific Railroad Company a bill was introduced in Congress which, after amendment, became the Joint Resolution of May 31, 1870, and alleges that under the authority of said Joint Resolution the Northern Pacific Railroad Company made its mortgage known as its "First Mortgage and Trust Deed." Admits that Exhibit E attached to the bill of complaint is a correct copy of said mortgage.

Admits that bonds issued under said mortgage were sold to the amount of $31,000,000 more or less. Admits that with moneys so obtained and with moneys otherwise received the Northern Pacific Railroad Company constructed its railroad from Thompson Junction, Minnesota, to Bismarck, North Dakota, and from Kalama, Washington, to Tacoma, Washington. Alleges that the portion of said line of railroad between Thompson Junction and Bismarck was completed on or about June 3, 1873. Admits that the railroad between Kalama and Tacoma was completed prior to December 31, 1873.

The facts as to the other matters set forth in subdivision IX are these:

463 Under the agreement of January 1, 1870, set forth in Exhibit D attached to the bill of complaint, the banking house of Jay Cooke & Company became the fiscal agent of the Northern Pacific Railroad Company and the agent of the company in the sale of bonds secured by the mortgage of July 1, 1870. In the latter part of the year 1873 there occurred in the United States a nation-wide financial panic. In this panic Jay Cooke & Company failed. Many banks, trust companies, and commercial enterprises of various kinds throughout the country became insolvent. New enterprises were abandoned and business generally was prostrated throughout the country. The value of stocks and bonds greatly decreased and the sale of securities became almost impossible. The finances of the country were in a state of confusion. The effects of the panic continued for several years

after 1873 and recovery from the panic was very slow. Before the panic and in the year 1872 the sale of Northern Pacific bonds had fallen off greatly and the company had little money to continue building. In 1872 the directors of the company raised a large sum of money on their personal credit and furnished it to the company to meet some of its pressing obligations. The sale of bonds entirely ceased in 1873 after the failure of Jay Cooke & Company. The population along the part of the railroad that had been built was small and the returns from operation were inadequate to meet the obligations of the company. The railroad had reached no objective point and could be made valuable only by extending it further. The interest rate on bonds that had been issued was 7.3 percent and the company's debt was increasing at the rate of over $2,000,000 per year. The company had defaulted on January 1, 1874, in payment of interest on its bonds. By 1875 the condition of the company's affairs was desperate. On the 18th day of March, 1875, a general meeting of the bondholders of the Northern Pacific Railroad Company was held to consider the situation and a committee of bondholders was appointed.

On April 16, 1875, a suit for foreclosure of the mortgage and sale of the mortgaged premises was begun by the trustees of the mortgage in the Circuit Court of the United States for the Southern District of New York. On May 12, 1875, a decree of foreclosure and sale was made and filed. In that decree the court ordered that the property of the Northern Pacific Railroad Company, except the lands and land grants, should be sold in one entire parcel as an entirety under the direction of Oliver Fiske and Kenneth G. White, Esquires, as Master Commissioners, at public auction, and further ordered that the lands and land grants conveyed in the mortgage should be sold at public sale at places within the states and territories in which they were situate, after not less than sixty days' previous notice, in single sections or subdivisions, to the highest bidder. On June 30, 1875, a general meeting of the bondholders was held and a plan of reorganization was adopted. Exhibit F attached to the bill of complaint is a correct copy of the plan of reorganization. By a petition of the Purchasing Committee of the Bondholders dated August 3, 1875, the plan of reorganization was brought to the attention of the court. On August 6, 1875, the court entered an order modifying the decree of May 12, 1875. In this order the court finds:

"that portions of the lands earned by the said defendant by the partial construction of its railroad have never yet been surveyed by the Government of the United States, or otherwise, but be and remain an undistinguishable and unascertain-

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able part of the public domain, and incapable of segregation from the body of the public lands, and the right or interest of said defendant to and in such lands is vague, existing only as and in the nature of a floating claim or right, under the charter of the said defendant.

"And the Court doth further find that the portion of the surveyed lands of the United States, so earned by the said defendant but not yet patented or certified, has not been ascertained or determined, in any manner or by any authority, to belong or enure to the said defendant, or to be subject to the satisfaction of its land grant; or that the same, or any part thereof, has not been reserved, sold, granted, or otherwise appropriated, and was free from preemption or other claims of right at the time when the line of said road was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, as provided in Section three of the charter of the said Company.

"And the Court doth further find that it is an impossibility to sell lands earned by said Company, which have not been surveyed; and that lands earned as aforesaid, that have been surveyed, but not certified to said defendant, cannot be sold, because the claim or interest of the said defendant to or in such lands has not been ascertained so as to determine what parcel and parcels thereof may enure to the said defendant under the conditions and provisions of the said charter,

"And the Court doth further find that thereby lands embraced in the said Deed of Trust that can be sold under the decree in this cause, by sections or subdivisions of a section, or otherwise, are those lands which have been patented or certified to said defendant, by the United States or their Land Officers, remaining undisposed of by the said defendant and trustees in accordance with the provisions of said Deed of Trust; and that an attempted sale by the Master Commissioners of the said Company's interests in lands, uncertified or unsurveyed, would practically be of no pecuniary benefit to the cestui que trust."

By the amended decree filed on the 6th day of August 1875, pursuant to this order, the railroad, its equipment, the franchises and the land grant, except the lands patented and certified, were directed to be sold in one parcel and the sale of the patented and certified lands was stayed until the further order of the court. This stay was never vacated. On August 12, 1875, the foreclosure sale took place and on the same date the report of the Master on the sale was made to the court. This report contained a copy of the plan of reorganization. On the same day a decree was entered approving the sale and in this decree a reference is made to said plan. On the 25th day of August 1875, the court

made an order and decree confirming said sale and provided in said order:

"that * * * the said masters commissioners shall forthwith execute and acknowledge in due form of law, and deliver, a deed of conveyance of the said property, rights, liberties, and franchises, sold as aforesaid, to the said purchasers. And it is further hereby

'Ordered, that, at the same time, the said complainants, Jay Cooke and Charlemagne Tower, trustees of the mortgage or deed of trust in the said final decree mentioned; and George W. Cass, the said receiver, make, execute, and acknowledge, in due form of law, and deliver, good and sufficient deed or deeds of conveyance to the said purchasers of all the property, rights, liberties, and franchises sold as aforesaid, and of all their and each and every of their right, title, interest, and estate therein and therto.'"

On September 17, 1875, a deed was made by the Masters to the Purchasing Committee of the Bondholders and in this deed the reorganization plan was set out. Deeds of conveyance were also made by the Trustees and by the Receiver.

On September 29, 1875, pursuant to a call of the Purchasing Committee, a meeting of the preferred stockholders of the Northern Pacific Railroad Company was held. At this meeting the Purchasing Committee made its report, setting forth that it had purchased at judicial sale on the 12th of August 1875, "all the property of the Northern Pacific Railroad Company
465 (except the patented and certified lands), together with all its right, liberties, and franchises, including the franchise to be a corporation" and that deeds to all of said property and franchises so purchased had been received by the Purchasing Committee on behalf of all the parties assenting to the plan of reorganization. Said report further stated that the patented lands of the company had not then been sold, and that to enable the Committee to act when the sale should occur and for the purpose of securing to the bondholders in general the full benefit of the entire property of the company under the foreclosure the Committee, acting under the advice of counsel, had caused the bonds deposited with The Farmers' Loan and Trust Company to remain subject to the control of the Committee for such further use as the interest of the bondholders might demand, and reported that the decree for the sale of the patented lands provided that 5 percent should be paid in cash and that the balance might be paid in the First Mortgage bonds of the company. The report of the Purchasing Committee was accepted and ordered to be placed on the minutes of the meeting. A Board of Directors of thirteen members was then elected and the meeting adjourned

sine die. On the same day and prior to the meeting of the stockholders, the Purchasing Committee held a meeting and adopted the following preamble and resolution:

"Whereas, this Committee has called a meeting of the parties assenting to and complying with the conditions of the 'Plan' of the holders of the First Mortgage Bonds of the Northern Pacific Railroad Company, who thereupon will assume and have the control and management of the Railroad, property, and franchises of the Company; and the said parties assenting to, and complying with, the conditions of said plan will thenceforth be the corporators of said company and as such, the owners in their corporate capacity of the railroad, property, rights, liberties and franchises, including the franchise to be a corporation, purchased by this Committee in pursuance of said Plan at a sale thereof made on the 12th day of August, 1875, under the decree of the Court.

"And whereas, by the Deeds of conveyance of said railroad, property, rights, liberties and franchises, including the franchise to be a corporation, made to this Committee, in pursuance of said decree and the order of the Court confirming said sale, the title to the same and every part thereof becomes, ipso facto, absolutely vested in all the said parties assenting to and complying with the conditions of said plan, as the Corporators of the Northern Pacific Railroad Company and in their corporate capacity, without any further act, deed or ceremony whatsoever.

"And whereas, it has been suggested that circumstances may hereafter exist or arise, although, at present not apparent to this Committee, rendering it expedient or desirable that the title to said Railroad, property, rights, liberties, or franchises, or any or either of them, or any part or parts thereof be further declared, perfected and assured.

"Resolved, That this Committee or the survivors of them, or their successors shall and will from time to time and whenever requested by the said Northern Pacific Railroad Company, its successors or assigns, make, execute, acknowledge and deliver such deed or deeds, instrument or instruments and do and perform such other appropriate act or acts as the said Northern Pacific Railroad Company may reasonably advise, devise or require, for the further, better, or more certain and effectual securing, declaring, perfecting and assuring the title to the said railroad, property, rights, liberties, and franchises, as and to the said Northern Pacific Railroad Company, its successors and assigns."

On January 11, 1876, the court made an order which provided that the Receiver might make contracts for the sale of the pat-

ented or certified lands in like manner and with the same effect as similar contracts were made by the Northern Pacific Railroad Company before the appointment of the Receiver, and that deeds and conveyances of such lands should be executed, acknowledged and delivered by the Receiver in conjunction with the Trustee.

On December 16, 1876, pursuant to this order of the court,
466 Frederick Billings on behalf of the Northern Pacific Railroad Company purchased from George W. Cass, Receiver, all of the patented and certified lands which had been excepted from the foreclosure sale, and on the same day said Frederick Billings deeded all of said lands so received to the Northern Pacific Railroad Company, a corporation created by and existing under the laws of the United States.

On the 22nd day of March, 1882, a meeting of the Bondholders' Purchasing Committee was held and the following preamble and resolution were adopted:

"Whereas, the Counsel was heretofore requested to advise this Committee if any conveyance should be made by it to the Northern Pacific Railroad Company, and if in his opinion there should be, to prepare the same for execution; and he having advised the Committee that no conveyance, or other act or deed, is necessary to pass or confirm the title to or in the Company, to the property or franchises purchased by the Committee at the foreclosure sale made on the twelfth day of August 1875, under, and in pursuance of, the decree of the Court; the title, to all intents and purposes, having been, on the 29th day of September 1875, fully vested in said Company, as then reorganized; but for the purpose of a continuity of record title, a formal conveyance is desirable and proper. And the counsel having prepared, and now presented, a form of deed, and the same being approved by this Committee; therefore,

"Resolved, That the several members of this Committee, as such committee, will make, execute and acknowledge, in due form of law, and deliver to the said Northern Pacific Railroad Company, the said deed of conveyance, of the railroad, property, rights, liberties and franchises, including the franchise to be a corporation, purchased by this Committee as aforesaid, and conveyed to this Committee by the deeds of the Master-commissioners, who made said sale, the trustees of the mortgage mentioned in the decree of the Court under which said sale was made, and the receiver appointed by order of the Court, and also all the rights, interests, claims, demands, actions, and causes of action, of every nature and description, acquired by, or devolving upon, this Committee, as such, under, by, or through the foreclosure proceedings and the sale made in pursuance of the decree therein or in any other manner or by any other means

whatsoever. And that said deed of conveyance be entered at large upon the record of the proceedings of this Committee."

On the same day a deed was made by said Purchasing Committee to the Northern Pacific Railroad Company, a corporation created by and existing under the laws of the United States of America, of all and singular the railroad and property, and rights of property, of every name, nature and description, wheresoever and however held, situate and being, together with all the rights, privileges, liberties, and immunities, and franchises, including the franchise to be a corporation mentioned and described in the deed of conveyance bearing date the 17th day of September, in the year 1875, made by Oliver Fiske and Kenneth G. White, Master-commissioners, and in the deed of conveyance bearing date the 27th day of September 1875, by Jay Cooke and Charlemagne Tower, Trustees, and in the deed of conveyance bearing date the 28th day of September 1875, by George W. Cass, Receiver, and by the said several deeds granted and conveyed to said Purchasing Committee.

Admits that under the plan of reorganization herein referred to, namely, Exhibit F attached to the bill of complaint, the capital stock of the Northern Pacific Railroad Company was divided into $51,000,000 of preferred stock and $49,000,000 of common stock; that approximately $42,000,000, not $44,000,000 as alleged, was issued in exchange for bonds under the First Mortgage and Deed of Trust to the amount of $31,000,000, more or less. Admits that $26,275,600, not $29,952,600 as alleged, in common stock was issued in place of the same amount of common stock then outstanding. Admits that $19,047,400,
467 more or less, in common stock was issued as 25-mile sections of the railroad were completed. Alleges that $3,510,000 in common stock was issued on account of shares due holders of original interests who had not received their full quota of the old stock issued because of construction prior to September 29, 1875. Alleges that $167,000 in common stock that was reserved for conversion of old stock was never claimed. Defendant admits that the reorganization plan of June 30, 1875, provided that the preferred stock of the Northern Pacific Railroad Company should be convertible at par into any lands belonging to the Railroad Company or thereafter belonging to it in the State of Minnesota and in the territory of Dakota east of the Missouri River until default should occur in the provisions of the new First Mortgage bonds contemplated by the plan of reorganization, and that the conversion of said preferred stock should be an extinguishment thereof.

The facts relating to the receipt and sale of lands by the Northern Pacific Railroad Company are these:

Prior to May 12, 1875, 743,906.64 acres of land had been patented to the Northern Pacific Railroad Company, and prior to that date said company, by filing maps of definite location and also by construction of railroad, had earned more than 8,000,000 acres of land, partly place lands and partly indemnity for lands in place excepted from the grant. Part of the unpatented lands was surveyed and a part was unsurveyed at that time. The portion of surveyed lands that had not been patented had not at said time been found by any public authority not to be mineral and not reserved, sold, granted or otherwise appropriated or free from preëmption or other claims or rights at the time when the line of road was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, as provided in Section 3 of the Act of July 2, 1864. No lands were sold in the reorganization proceedings except as herein set forth. Defendant denies that any of said lands were sold in violation of any law of the United States. Defendant denies that any of the provisions of the Joint Resolution of May 31, 1870, were applicable to the sales of lands made in the reorganization proceedings.

Denies that subdivision IX and in particular that portion thereof referred to in lines 5 to 8, inclusive, on page 19 of the bill, correctly sets forth the provisions of the Joint Resolution of May 31, 1870, and alleges that said Joint Resolution by its terms applies only to lands granted thereby. Denies that the provisions of said Joint Resolution of May 31, 1870, are correctly referred to in subdivision IX and in particular in lines 8 to 10, inclusive, on page 20 of the bill, and denies that there is any requirement in said Joint Resolution that lands be sold to third persons upon foreclosure. Admits that a petition dated August 4, 1875, was filed in the foreclosure proceedings by Jay Cooke and Charlemagne Tower. Denies that the statements in said petition were untrue or misleading.

Denies that any of the proceedings in court or elsewhere in connection with the reorganization of 1875 were collusive or fraudulent as to the United States or at all and denies that it was the intent and purpose of the said plan of reorganization or of the subscribers thereto or the beneficiaries thereunder to defraud the United States or any one else, and alleges the fact to be that the sole intent of the subscribers to the plan and the beneficiaries thereunder was to rescue the Northern Pacific Railroad Company from insolvency and to rid the property of a burden of approximately $31,000,000 of debt under the
468 First Mortgage and Deed of Trust by substituting preferred stock for bonds held under said mortgage and to

make it possible for the Northern Pacific Railroad Company to secure funds to continue the work of constructing the railroad which it was authorized to construct by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, and alleges that this result was accomplished by said proceedings in court and the plan of reorganization.

Save as aforesaid, defendant denies each and every allegation in said subdivision IX contained.

X

The facts as to the matters referred to in subdivision X are these:

At the time of the reorganization of 1875 the opinion of many lawyers and courts was that the franchise to be a corporation could be transferred by foreclosure sale to the purchaser at the sale and lawyers of national prominence and high standing at the bar advised that the franchise of the Northern Pacific Railroad Company to be a corporation did pass by the foreclosure sale of August 12, 1875. Several inferior courts so held but that question has never been passed upon by the Supreme Court of the United States. However, that court did hold in the case of Memphis & Little Rock Railroad Co. v. Railroad Commissioners, 112 U. S. 609, decided in 1884, that:

"The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises" (p. 619).

and the court held in that case with reference to the particular corporation under consideration that its franchise to be a corporation under a state statute had not passed by foreclosure sale. The incorporators and bondholders and stockholders of the Northern Pacific Railroad Company have at all times claimed that the Northern Pacific Railroad Company that did business after 1875 was the Federal corporation provided for in the Act of July 2, 1864, and said corporation after 1875 exercised the powers and rights conferred by the Act of July 2, 1864, and recognized as binding upon it the obligations imposed by said Act. The United States prior to the institution of this suit never made any distinction between the Northern Pacific Railroad Company as it existed prior to the 1875 reorganization and the Northern Pacific Railroad Company as it existed after the reorganization.

Subsequent to the reorganization the United States dealt with the Northern Pacific Railroad Company as the corporation provided for in the Act of July 2, 1864, and required the Northern Pacific Railroad Company to transport mail, troops, and property of the United States at less than tariff rates as provided in Section 11 of the Act of July 2, 1864. Sections of the railroad authorized by the Act of July 2, 1864, were constructed by the Northern Pacific Railroad Company after 1875, were examined by commissioners and accepted by the President of the United States as provided in Section 4 of said Act. Patents for lands opposite such constructed railroad were thereafter issued to the Northern Pacific Railroad Company and many Acts of Congress were passed recognizing the Northern Pacific Railroad Company that did business and constructed sections of railroad after 1875 as being the corporation created by the Act of July 2, 1864.

469 Subsequent to August 12, 1875, the Northern Pacific Railroad Company made certain mortgages hereinafter described. On August 15, 1893, a creditors' bill was filed in the Circuit Court of the United States for the Eastern District of Wisconsin, to subject the property of the company to the payment of its debts, and on October 18, 1893, a bill was filed in the same court to foreclose certain of said mortgages made by the Northern Pacific Railroad Company. By order of court dated October 18, 1893, both causes were consolidated. Pursuant to decrees made and entered by the United States Circuit Court for the Eastern District of Wisconsin in the Consolidated Cause, and decrees entered by the United States Circuit Courts for various other districts in ancillary causes, the Northern Pacific Railway Company purchased the railroad and telegraph line, property, and franchises of the Northern Pacific Railroad Company, and lands granted by the United States to said company and all the rights of said company under the land grants made by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870.

Save as aforesaid, defendant denies each and every allegation in said subdivision X contained.

XI

Answering subdivision XI, defendant refers to paragraphs IX and X of this answer and realleges the facts alleged therein, and save as therein admitted, denied, or otherwise answered unto defendant denies each and every allegation in subdivision XI contained.

XII

Answering subdivision XII, defendant admits that the plan of reorganization of June 30, 1875, provided that preferred stock

should be convertible at par value into any lands belonging to the company in the State of Minnesota and in the territory of Dakota east of the Missouri River until default should occur in some of the provisions of the new First Mortgage bonds therein provided for, and that such conversion should be an extinguishment of such stock and that the proceeds of all sales of such lands until such default should be used in extinguishment of such stock. Alleges that under said provision of the plan preferred stock to the amount of $15,000,000, more or less, was retired by the Northern Pacific Railroad Company through payment for lands or through purchases with the proceeds of land sales; that the approximate quantity of lands sold for preferred stock or the proceeds of which was used to retire stock was 4,250,000 acres.

Defendant refers to paragraphs IX and X of this answer and realleges the facts alleged therein, and save as therein or in this paragraph admitted, denied, or otherwise answered unto, defendant denies each and every allegation in subdivision XII contained.

XIII

Answering subdivision XIII, defendant admits that the final date fixed by Congress for the completion of the entire railroad and telegraph line contemplated by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, was July 4, 1879. Denies that on July 4, 1884, or at any other time the Northern Pacific Railroad Company was required by the Joint Resolution of May 31, 1870, to open to settlement and preëmption the lands
470 granted by the Act of July 2, 1864; alleges that the proviso in said Joint Resolution relative to settlement and preëmption relates only to place lands between Portland and Tacoma granted by said Joint Resolution, and for a correct statement of the terms of said Joint Resolution defendant begs to refer to the Joint Resolution itself. Denies that said proviso ever became operative as to lands granted by said Joint Resolution, for the reason that at all times between July 4, 1884, and the foreclosure sales that took place in 1896 said lands were subject to mortgages authorized by said Joint Resolution. Defendant admits that subsequent to July 4, 1884, large acreages of lands granted to the Northern Pacific Railroad Company by Congress were sold by the Northern Pacific Railroad Company and by the Northern Pacific Railway Company at varying prices and were not opened to settlement and preëmption by the Northern Pacific Railroad Company or the Northern Pacific Railway Company. Alleges that the proviso in the Joint Resolution of May 31, 1870, with reference to settlement and preëmption imposed no duties upon the Northern Pacific Railroad Company. Denies that the failure

of the Northern Pacific Railway Company or of the Northern Pacific Railroad Company to open any and all lands to settlement and preemption was a breach of any contract with the United States.

XIV

Answering subdivision XIV, defendant begs to refer to the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, for a determination of the intent and purpose of Congress. Admits that no line of railroad was constructed by the Northern Pacific Railroad Company between Wallula, Washington, and Portland, Oregon. Alleges that no line of railroad was ever definitely located between Wallula, Washington, and Portland, Oregon, via the valley of the Columbia River. Admits that in the year 1880 Henry Villard acquired a large stock interest in the Northern Pacific Railroad Company and admits that said Henry Villard was elected President of the Northern Pacific Railroad Company in September 1881. Admits that on June 28, 1881, the Oregon & Trancontinental Company was organized under the laws of the State of Oregon and admits that one of the objects of said company was to acquire and hold a controlling interest in the stocks of the Northern Pacific Railroad Company and the Oregon Railway & Navigation Company. Admits that subsequent to June 28, 1881, the Oregon & Transcontinental Company acquired a large interest in the capital stock of the Northern Pacific Railroad Company, but denies that it acquired a controlling interest in the sense that it ever owned a majority of the stock. Admits that the Oregon & Transcontinental Company entered into tripartite contracts with the Northern Pacific Railroad Company and with certain other railroad companies under which contracts provision was made for the construction or acquisition of branch lines connecting with the railroad of the Northern Pacific Railroad Company. Alleges that said tripartite contracts were seven in number; that the names of the branch-line companies which were parties to said contracts, respectively, the dates on which said contracts were made and the location of the branch-line railroads built pursuant to said tripartite contracts are as follows:

(1) Fargo & Southwestern Railroad Company. July 1, 1882. Fargo, North Dakota, to LaMoure, North Dakota.

471 (2) Northern Pacific, Fergus & Black Hills Railroad Company. October 20, 1882. Wadena, Minnesota, to Breckenridge, Minnesota, Breckenridge, Minnesota, to Milnor, North Dakota, and Fairview Junction, North Dakota, to Adams, North Dakota.

(3) Little Falls & Dakota Railroad Company. October 20, 1882. Little Falls, Minnesota, to Morris, Minnesota.

(4) Jamestown & Northern Railroad Company. July 1, 1882. Jamestown, North Dakota, to Minnewaukan, North Dakota, and Carrington, North Dakota, to Sykeston, North Dakota.

(5) Sanborn, Cooperstown & Turtle Mountain Railroad Company. April 18, 1883. Sanborn, North Dakota, to Cooperstown, North Dakota.

(6) Helena & Jefferson County Railroad Company. August 1, 1883. East Helena, Montana, to Wickes, Montana.

(7) Rocky Mountain Railroad Company of Montana. August 1, 1883. Livingston, Montana, to Gardiner, Montana.

Alleges that the branch line railroads contemplated by said tripartite contracts were constructed pursuant to the terms of the contracts and admits that said branch line railroads had a total mileage of approximately 504 miles. Admits that the branch line railroad companies were organized by the Oregon & Transcontinental Company or their stock acquired by said company. Alleges that by the terms of said tripartite contracts the capital stock of each branch line company was to be delivered to or deposited for the Oregon & Transcontinental Company as part of the compensation for the construction of the branch line of railroad of such branch line company and was to be held by a trustee until all the bonds secured by a mortgage issued by the branch line company should be fully paid or redeemed and should then be delivered to said Northern Pacific Railroad Company. Admits that the Oregon & Transcontinental Company provided the money for the construction or purchase of the branch line railroads, and as a consideration therefor received, in addition to the capital stock, $20,000 in bonds of the branch line railroads for each mile of railroad constructed under the tripartite agreements. Admits that under the tripartite agreements the Northern Pacific Railroad Company agreed that the net earnings from all sources of each branch line railroad should amount to at least $1,400 per mile per annum. Alleges that $10,063,000 of branch line bonds were issued by the branch line companies to the Oregon & Transcontinental Company. Alleges that said contracts provided that out of the receipts from traffic interchanged by the branch line railroad companies and the Northern Pacific Railroad Company a sufficient amount should be collected and retained by the Northern Pacific Railroad Company to pay the semiannual interest on the bonds and the payments to the sinking fund provided for in said mortgages, and said contracts further provided that if so requested by the trustees of said mortgages the Northern Pacific Railroad Company would make the semiannual inter-

est payments directly to the trustee or to whomsoever should be entitled thereto according to the terms of the mortgages. Alleges that defendant has no knowledge or information sufficient to form a belief as to the truth of the allegation that the cost to the Oregon & Transcontinental Company of constructing said branch line railroads was below the par value of the branch line bonds received by the Oregon & Transcontinental Company
472 from the branch line companies and therefore denies the allegation. Admits that said branch line railroads and all of them were constructed through sparsely settled territory, but denies that it was not reasonably to be expected that the net revenues from said branch lines would be sufficient to pay the fixed charge of $1,400 per mile. Denies that said agreements were collusive or fraudulent devices under which the Oregon & Transcontinental Company received unconscionable and illegal profits at the expense of the Northern Pacific Railroad Company and denies that said tripartite agreements were violative of any contract between the United States and the Northern Pacific Railroad Company. Admits that said contracts were made at a time when the Northern Pacific Railroad Company had not built a line of railroad between Wallula, Washington, and Portland, Oregon, but denies that the Act of July 2, 1864, or the Joint Resolution of May 31, 1870, constituted a contract between the United States and the Northern Pacific Railroad Company which obligated the Railroad Company to construct a line between the said points, and for a true statement of the terms and conditions of said Act of July 2, 1864, and the Joint Resolution of May 31, 1870, defendant begs leave to refer to said Act and to said Joint Resolution. Alleges that the true objects sought by the construction of such branch lines were the development of large extents of territory on either side of the Company's constructed line, the securing of business and traffic for the support of the main line, and furnishing to settlers access to markets, and alleges that said objects were attained.

Denies that the bonds of said branch line companies were retired by the Northern Pacific Railroad Company and alleges that they were purchased by the Northern Pacific Railroad Company with bonds issued by it under its Consolidated Mortgage of December 2, 1889. Denies the allegations contained in the last paragraph of said subdivision XIV and alleges that the Northern Pacific Railroad Company bought the bonds and the capital stock of the branch line railroads, the names of which appear in Exhibit L and Exhibit M attached to the bill of complaint, with bonds secured by its Consolidated Mortgage of December 2, 1889.

Save as aforesaid, defendant denies all of the allegations in said subdivision XIV contained.

XV

Answering subdivision XV defendant begs to refer to the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, for a determination of the intent and purpose of Congress.

Save as aforesaid, defendant denies all of the allegations in said subdivision XV contained.

XVI

The facts as to the matters referred to in subdivision XVI are these:

The Northern Pacific Railroad Company made mortgages on the dates and in the amounts stated. Exhibits G to L, inclusive, are correct copies of said mortgages respectively, and said mortgages were filed with the Secretary of the Interior.

Save as aforesaid, defendant denies the allegations of subdivision XVI.

XVII

Answering subdivision XVII, defendant alleges that subsequent to July 4, 1879, the Northern Pacific Railroad Company with moneys received from sales of bonds issued under the mortgages referred to in paragraph XVI of this
473 answer, with the exception of the Consolidated Mortgage, built a main line railroad from Bismarck, North Dakota, to Wallula, Washington, from Portland, Oregon, to a point in Oregon opposite Kalama, Washington, from Thompson Junction, Minnesota, to Ashland, Wisconsin, and a branch line from Tacoma to Pasco, Washington.

Save as aforesaid, defendant denies the allegations contained in subdivision XVII.

XVIII

Answering subdivision XVIII, defendant admits the allegations set forth in the first paragraph of said subdivision.

Alleges that foreclosure bills similar to the foreclosure bill referred to in said first paragraph and containing the same allegations were filed in the United States Circuit Courts for the following named districts and on the following dates, respectively, each court appointing the same receivers, namely:

On the 25th day of October 1893, in the United States Circuit Courts for the Districts of North Dakota, Western Wisconsin, and Western Michigan; on the 28th day of October 1893, in the United States Circuit for the District of Oregon; on the 30th day of October 1893, in the United States Circuit Courts for the

Districts of Montana and Washington; on the 1st day of November 1893, in the United States Circuit Court for the District of Idaho; and on the 14th day of November 1893, in the United States Circuit Court for the District of Minnesota.

Further answering subdivision XVIII, defendant alleges the facts to be these:

Subsequent to the filing of the creditors' bill and the bill to foreclose the mortgages referred to in the first paragraph of subdivision XVIII and on the 19th day of February 1894, a Reorganization Committee, of which Edward D. Adams was Chairman, was created by holders of General Second Mortgage bonds, General Third Mortgage bonds and Consolidated Mortgage bonds of the Northern Pacific Railroad Company. The holders of a majority of the outstanding Consolidated Mortgage bonds, of a majority of the General Third Mortgage bonds and of nearly a majority of the General Second Mortgage bonds subjected their bonds to the control of the Reorganization Committee. Similarly a committee, called the Protective Committee, was organized, with Brayton Ives as Chairman, by stockholders of the Northern Pacific Railroad Company to protect the interests of stockholders. This committee thereafter actively represented the interests of the stockholders of the Northern Pacific Railroad Company, took part in the proceedings instituted by The Farmers' Loan and Trust Company and others, secured the appointment of additional receivers in some of the states through which the line of railroad of the Northern Pacific Railroad Company ran, and in general attempted to advance the interests of the stockholders in opposition to those of the bondholders. The operation of the Northern Pacific Railroad by receivers for a period of nearly two years demonstrated that if the enterprise were to be made a solvent one it would be necessary to reduce fixed charges very largely and to provide some millions of dollars in cash. On or about the 10th day of May 1895, an agreement was entered into between the Bondholders Committee and representatives of a majority of the capital stock of the Great Northern Railway Company for the reorganization of the Northern Pacific Railroad Company. The legality of this agreement was challenged by a stockholder of the Great Northern Railway Company on
474 the ground that it was violative of a statute of the State of Minnesota prohibiting the common control of parallel or competing lines. The agreement was held to be in conflict with that statute by the Supreme Court of the United States in Pearsall v. Great Northern Ry. Co., reported in Volume 161 U.S. 646 (March 30, 1896).

On March 16, 1896, a plan for the reorganization of the Northern Pacific system was presented to the holders of the bonds and

stocks issued or guaranteed by the Northern Pacific Railroad Company. This plan had been prepared with the approval and cooperation of J. P. Morgan & Company and the Deutsche Bank. The plan had received the approval of representatives of a majority of the bondholders under the mortgages in process of foreclosure and also the approval of the interests represented by the Protective Committee. Exhibit M attached to the bill of complaint contains a correct copy of the plan of reorganization. On the same date a reorganization agreement was entered into between the Reorganization Committee, The Mercantile Trust Company, J. P. Morgan & Company, holders of mortgage bonds of the Northern Pacific Railroad Company and of certificates of The Mercantile Trust Company for mortgage bonds, and holders of other obligations of the Northern Pacific Railroad Company, and holders of preferred and common stock of the Northern Pacific Railroad Company who should become parties to the agreement, the Deutsche Bank of Berlin, and the Protective Committee. A true copy of this reorganization agreement is a part of Exhibit M attached to the bill of complaint.

On April 27, 1896, a final decree of foreclosure and sale was entered in the Circuit Court of the United States for the Eastern District of Wisconsin which adjudged the lawful execution of certain mortgages by the Northern Pacific Railroad Company and the creation of liens as follow:

"The Missouri Division Mortgage of May 1, 1879, covering the line of railroad from the Missouri River in North Dakota to the Yellowstone River in Montana, under which bonds were authorized to the amount of $2,500,000 and of which there were outstanding on January 1, 1896, bonds of the face amount of $1,815,000 of principal constituting a lien on the railroad above described and the land grant pertaining thereto;

"The Pend d'Oreille Division Mortgage of September 1, 1879, covering the line of railroad from the Snake River in Washington to Lake Pend d'Oreille in Idaho, under which bonds were authorized to the amount of $4,500,000 and of which there were outstanding on January 1, 1896, bonds of the face amount of $357,000 of principal constituting a lien on the railroad above described and the land grant pertaining thereto;

"The General First Mortgage of January 1, 1881, covering the lines of railroad from Lake Superior to Puget Sound and from Portland to Tacoma, under which bonds were authorized to the amount of $25,000 per mile and of which there were outstanding on January 1, 1896, bonds of the face amount of $41,879,000 of principal constituting a lien on the railroad above described and on all lands granted by Congress;

The General Second Mortgage of November 20, 1883, covering the same property as the General First Mortgage above mentioned (except certain lands) and under which there were outstanding bonds of the face amount of $19,216,000 of principal and upon which there was due, principal and interest, at the date of the decree the sum of $23,033,738.80, constituting a lien on the mortgaged railroad and on all lands granted by Congress except lands in Minnesota and in North Dakota east of the Missouri River.

The General Third Mortgage of December 1, 1887, covering the same property as the General Second Mortgage and under which there were outstanding bonds of the face amount of $11,461,000 of principal and upon which there was due, principal and interest, at the date of the decree the sum of $13,606,212.70 constituting a lien on the mortgaged railroad and all lands granted by Congress except lands in Minnesota and in North Dakota east of the Missouri River.

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"The Consolidated Mortgage of December 2, 1889, covering (with other property, branch lines and securities) the same property as the General Second and Third Mortgages above mentioned and under which there were outstanding bonds of the face amount of $59,096,000 of principal and upon which there was due, principal and interest, at the date of the decree the sum of $71,643,703.63, constituting a lien on the mortgaged railroad and all lands granted by Congress except lands in Minnesota and in North Dakota east of the Missouri River."

The decree adjudged that the General Second, General Third, and Consolidated Mortgages were liens on the mortgaged property in that order respectively and that they were all subject to the prior liens of the Missouri Division, Pend d'Oreille Division, and General First Mortgages. The total amount found due by the decree under the General Second, General Third, and Consolidated Mortgages was $116,283,655.13 and it was decreed that the three mortgages last mentioned were in default and that the Railroad Company was largely indebted to other creditors and was insolvent. The decree directed that all of the mortgaged property except the lands granted by Congress be sold in one parcel and that the lands be sold as the court should thereafter direct but that such sale be subject to the prior lien of the Missouri Division, Pend d'Oreille Division and General First Mortgages which were not in default.

By the decree special provisions were made for payment by the successful bidder in cash in such proportion of his bid as the court should direct, provision was made for the distribution of the proceeds of the sale among the holders of bonds and coupons, and it was specially provided that the successful bidder might turn in to the master making the sale as part payment

of the purchase price bonds or coupons to an amount equal to their distributive share of the proceeds.

By supplemental decree entered on the following day, April 28, 1896, provision was made for the sale on sixty days' notice, in single sections or subdivisions thereof in the States where situate, of all the lands granted by Congress covered by the mortgages so foreclosed which lands had been patented or certified to the Company. Provision was made by the same decree for the sale as separate parcels in the several states along the lien of the right to receive under the land grant unpatented and uncertified lands.

By an order entered June 1, 1896, the court approved the proposed form of notices of sale submitted by the Special Master.

On the 13th day of July, 1896, an agreement was entered into between the Northern Pacific Railway Company and J. P. Morgan & Company, a true copy of which agreement is attached to the bill of complaint and marked Exhibit N, and for a correct statement of the terms of said agreement defendant begs leave to refer to said Exhibit N.

Thereafter and on the 25th day of July, 1896, at the City of Superior, Wisconsin, the sale provided for in the decree of April 27, 1896, was conducted by the Special Master. The property was sold to the defendant Northern Pacific Railway Company, a Wisconsin corporation, and the sale was confirmed by decree of the court on July 27, 1896. In compliance with the requirements of the supplemental decree of April 28, 1896, separate sales of lands and rights to land in the several states in which the mortgaged lands were situate were held. Sales were
476 made as directed in the supplemental decree of April 28, 1896, and at these sales defendant Northern Pacific Railway Company was the purchaser. The Special Master made a report to the Circuit Court of the United States in each district where ancillary proceedings were pending of the sales made in that district and the said reports were confirmed by the courts to which they were made. The Special Master also made a report dated August 8, 1896, to the Circuit Court of the United States for the Eastern District of Wisconsin, of sales of land made in Wisconsin and of sales made in other states. Thereafter and by a decree entered on the 8th day of August, 1896, the land sales made by the Special Master were confirmed. Upon like proceedings similar decrees were entered in the several ancillary suits.

Thereafter, pursuant to the foreclosure decrees, deeds were executed and delivered to the Northern Pacific Railway Company conveying to the Northern Pacific Railway Company the railroad and land grant and all other properties formerly owned by the Northern Pacific Railroad Company with the exception of land

grant lands in the State of Minnesota and the State of North Dakota east of the Missouri River. These deeds were made, respectively, by the Special Master, the Northern Pacific Railroad Company, the Trustees of the mortgages that were foreclosed and the Receivers.

By petition filed September 25, 1897, addressed to the Circuit Court of the United States for the Eastern District of Wisconsin, the Receivers petitioned the court to sell unsold lands and land contracts and any other remaining assets of the Northern Pacific Railroad Company at public auction to the highest and best bidder. On April 27, 1899, an order was made by said Circuit Court authorizing and directing that such sale be made by the Special Master. On May 25, 1899, said order was amended and subsequently said Special Master, pursuant to said amended order, sold said lands and duly reported the sales to the said Circuit Court. The Northern Pacific Railway Company was the purchaser of the lands and rights to lands so sold by the Special Master. On September 16, 1899, said court entered a decree confirming the Special Master's report of sales and in this decree provided that deeds to the lands sold should be made by the Special Master, by the Receivers, and by the Northern Pacific Railroad Company. These deeds were duly made.

Admits that the United States was not a party to the Consolidated Cause or to any of the proceedings had in connection therewith. Admits that in 1895 Edward D. Adams, who was then Chairman of the Reorganization Committee, was elected President of the Superior and St. Croix Railroad Company, a Wisconsin corporation, and admits that an employe of J. P. Morgan & Co. was a member of the Board of Directors of the Superior and St. Croix Railroad Company during the year 1895. Admits that that portion of the Joint Resolution of May 31, 1870, which is quoted in the tenth paragraph of subdivision XVIII, reads as therein set forth. Admits that on April 28, 1896, the General Second Mortgage, the General Third Mortgage and the Consolidated Mortgage covered all of the lands granted by Congress to the Northern Pacific Railroad Company by the Act of July 2, 1864, and by the Joint Resolution of May 31, 1870, that were on April 28, 1896, owned by the Northern Pacific Railroad Company and situated in Wisconsin, Wyoming, Montana,
477 Idaho, Washington, Oregon and in North Dakota west of the Missouri River. Alleges that the lands situate in Minnesota and in North Dakota east of the Missouri River were not covered by any of the aforesaid three mortgages, but were covered by the General First Mortgage. Admits that under the plan of reorganization of June 30, 1875, preferred stockholders were given the right to exchange preferred stock for lands in

Minnesota and in Dakota east of the Missouri River. Admits that the Northern Pacific Railway Company subjected the properties acquired by it at the foreclosure sales, including lands granted to the Northern Pacific Railroad Company by the United States, to its Prior Lien Mortgage and its General Lien Mortgage. Admits that at all times since receiving deeds to said properties and lands the Northern Pacific Railway Company has dealt with them as its own lands. Denies that in so doing the Northern Pacific Railway Company has violated any of the provisions of the Act of July 2, 1864, or of the Joint Resolution of May 31, 1870. Defendant denies that the plan of reorganization of March 16, 1896, or any of the proceedings in the Consolidated Cause were collusive or fraudulent against the United States and denies that said plan or said proceedings or any of them were violative of any of the provisions of the Act of July 2, 1864, or the Joint Resolution of May 31, 1870.

Save as aforesaid, defendant denies each and every allegation contained in subdivision XVIII.

XIX

Answering subdivision XIX, defendant says that the matters therein set forth are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint. Without waiving this defense defendant admits that the total original cost of the main line and branch line therein described, exclusive of cost of equipment, interest during construction and other general expenses, was approximately $68,000,000, but says that the total original cost of said main line and branch line, including cost of equipment and all other expenditures properly chargeable thereto as of June 30, 1887, was in excess of $102,000,000, and that the Northern Pacific Railroad Company and the Northern Pacific Railway Company have spent more than $300,000,000 in construction and equipment of said main line and branch line. The net proceeds to December 31, 1929, from lands granted to the Northern Pacific Railroad Company were approximately $90,000,000. These proceeds were received from time to time over a period of nearly sixty years and none of them were wrongfully received.

XX

Answering subdivision XX, defendant admits that the Supreme Court of the United States decided the case of United States vs. Northern Pacific Railway Company, reported in 256 U. S. 51, on April 11, 1921, and admits that thereafter and in response to

the said decision the Commissioner of the General Land Office undertook the making of an adjustment of the land grants made to the Northern Pacific Railroad Company. By letter dated December 19, 1923, the Commissioner of the General Land Office submitted to the Northern Pacific Railway Company a tentative adjustment of the grants and advised the Railway Company that all interested parties might file briefs, statements or arguments relative to said tentative adjustment, and that
478 after due consideration a report would be submitted to the Secretary of the Interior embodying an adjustment of the grants for such action as he might deem appropriate. Thereafter briefs were filed by the Acting Forester and by the Northern Pacific Railway Company. In this tentative adjustment the Commissioner of the General Land Office found that the grant to the Northern Pacific Railroad Company under the Act of July 2, 1864, was deficient to the extent of 2,703,270.12 acres, and that the grant under the Joint Resolution of May 31, 1870, was deficient to the extent of 1,230,442.39 acres. Alleges that nothing further was done with reference to this tentative adjustment and no report was submitted to the Secretary of the Interior embodying an adjustment of the grants, for the reason that Congress adopted a Joint Resolution on June 5, 1924, wherein the Secretary of the Interior was directed to withhold his approval of the adjustment of the Northern Pacific land grants until after Congress should have made a complete inquiry into said lands grants. Admits that the Joint Committee provided for in said Joint Resolution of June 5, 1924, held hearings, and made a record of the hearings. Denies that any tentative adjustment was made on the 5th day of March 1925, by the Commissioner of the General Land Office, but admits that by letter of March 6, 1925, and by letter of March 25, 1925, information in regard to the land grants was transmitted to said Joint Committee pursuant to the requirement in Section 2 of the Joint Resolution of June 5, 1924, that the Secretary of the Interior advise Congress of the status of the Northern Pacific land grants. Alleges that neither of said letters nor any of the papers therein referred to were served on this defendant and alleges that the Secretary of the Interior did not purport to make any adjustment of the grants in and by said letters. Admits that the Northern Pacific Railroad Company and the Northern Pacific Railway Company have received under the Act of July 2, 1864, approximately 37,800,000 acres of land, and under the Joint Resolution of May 31, 1870, 1,600,000 acres of land, making a total of approximately 39,400,000 acres. Denies that any portion of these lands was received wrongfully. Admits that the Secretary of the Interior has not found that a deficiency exists in the land grants other

than as above set forth, but alleges that the Secretary of the Interior on May 20, 1914, in the case of Hessey v. Northern Pacific Railway Company, reported in 43 L. D., 302, 304, held that it had been ascertained by the Land Department that the amount of land which the Railway Company will receive will be far short of the quantity originally granted. Defendant alleges that on June 5, 1924, its grant under the Act of July 2, 1864, was deficient 2,568,882.38 acres, and its grant under the Joint Resolution of May 31, 1870, was deficient 1,209,778.44 acres. Admits that by the Act of June 25, 1929, Congress directed the institution of litigation to determine controversies respecting the land grants to the Northern Pacific Railroad Company, but denies that said Act of June 25, 1929, contains any reference to the letter of March 25, 1925, above mentioned, and for a true statement of the terms of said Act, defendant begs leave to refer to the Act itself. Admits that said land grants have been under the administration of the Secretary of the Interior. Denies that large areas or any areas of land were credited to the Northern Pacific Railroad Company or to the Northern Pacific Railway Company by reason of fraud practiced upon the Secretary of the Interior.

479 Admits that some lands were credited to the Northern Pacific Railroad Company or to this defendant through errors of law and fact made by the Secretary of the Interior. Denies that said errors were in any way induced by any act or deed of the Northern Pacific Railroad Company or this defendant and denies that as a consequence of said errors or in any other way the Northern Pacific Railway Company has received more lands than it is entitled to receive under said land grants. The Secretary has made other errors of law and fact which have denied to this defendant the right to receive large areas of land to which it is justly entitled. Admits that this defendant is claiming additional acreages, but denies that said claim is wrongfully asserted.

XXI

Answering subdivision XXI, defendant admits that the plaintiff has pleaded with substantial accuracy certain of the provisions of the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, save that the Joint Resolution of May 31, 1870, does not provide that the Northern Pacific Railroad Company should locate and construct a railroad and save that it does not restrict the Railroad Company in making indemnity selections within the second indemnity limits solely to the selection of indemnity for lands that were lost to it subsequent to July 2, 1864, in the primary limits of the grant, and for a correct statement of the

terms of said Joint Resolution defendant begs to refer to the Joint Resolution itself. Admits that the United States has withdrawn certain odd numbered sections within the second indemnity limits of the Northern Pacific land grant. Denies that said lands are now the property of the United States, save as said lands have been expropriated by the Act of June 25, 1929. Alleges that compensation for said lands has not yet been made to this defendant. Denies that when said withdrawals were made there were within the second indemnity limits sufficient lands within the odd sections to satisfy the losses that the Railway Company was entitled to have satisfied. Denies that said withdrawals were valid withdrawals and alleges that if at the time any of said withdrawals were made there were sufficient lands within the odd sections of the second indemnity limits to satisfy losses that then existed, said lands were not subject under the rules and regulations of the Secretary of the Interior to defendant's selection. Admits that the United States has expended money in the administration of said lands so withdrawn, but this defendant is without knowledge as to the sums so expended. Said expenditures were made with full knowledge of this defendant's claim to said lands. Admits that in Exhibit O there is contained a substantially correct description of odd-numbered sections of land within the second indemnity limits withdrawn for governmental purposes, save that said description covers surveyed and unsurveyed lands without distinguishing between them, and the areas of unsurveyed lands are estimated. Alleges that said description in Exhibit O is involved with other descriptions not referred to in the bill, and is accompanied by numerous introductory paragraphs and by footnotes containing irrelevant and immaterial statements of evidence and matters of argument. Defendant denies all matters contained in said Exhibit O except as above admitted.

Admits that this defendant, contending that a deficiency exists in said land grants, has filed and recorded with the officers of the Interior Department certain claims under and by virtue of which it asserts rights under the Act of July 2, 1864, and under
480 the Joint Resolution of May 31, 1870, to certain odd numbered sections, among others, within said second indemnity limits of the grant, and alleges that said claims constitute valid indemnity selections and that this defendant is the owner of and is entitled to the possession of the lands described in said claims. Alleges that patents have not been issued to defendant for said lands because of erroneous decision by the Secretary of the Interior to the effect that lands withdrawn for public purposes are not open to selection by defendant.

Admits that this defendant, contending that a deficiency exists, has, by certain claims filed and recorded with the officers of the Interior Department, claimed all of the nonmineral lands situate within odd numbered sections in the first and in the second indemnity limits of the said land grants. Denies that said lands are owned in fee simple by the United States save as some of them have been expropriated by the Act of June 25, 1929. Admits that descriptions of the lands so claimed within the second indemnity limits are correctly set forth in said Exhibit O (save as qualified and excepted above) and in Exhibit P attached to the bill of complaint. Alleges that certain of said lands lie both within the second indemnity limits of the grant under the Joint Resolution of May 31, 1870, and within the first indemnity limits of the grant under the Act of July 2, 1864. Alleges that a correct description of said lands is shown on Exhibit 1 hereto attached. Admits that in Exhibit Q there is contained a substantially correct description of certain odd numbered sections of land within the first indemnity limits claimed by the defendant, save that said description covers surveyed and unsurveyed lands without distinguishing between them, and the areas of unsurveyed lands are estimated. But alleges that in said Exhibit Q not all of the odd numbered sections of land within the first indemnity limits so claimed by defendant are shown and alleges that Exhibit 2 hereto attached correctly shows the additional lands in the first indemnity limits claimed by defendant. Alleges that said description in Exhibit Q is involved with other land descriptions not referred to in the bill, and is accompanied by numerous introductory paragraphs and footnotes containing irrelevant and immaterial statements of evidence and matters of argument. Defendant denies all matters contained in said Exhibit Q except as above admitted. Admits that dates of withdrawals are correctly shown on Exhibits O and Q.

Admits that defendant has filed claims in the local land office of the United States for certain lands situate in Montana within the primary limits of the grant in satisfaction of certain mineral losses. Alleges that the number of acres so claimed is 29,100. Denies that said claims are without merit. Alleges that 3,300 of said 29,100 acres are within the boundaries of the former Fort Ellis Military Reservation, restored to entry by Act of Congress of February 13, 1891. Admits that 25,800 acres (not 24,000 acres as alleged) are a part of an area of 364,500 acres (not 358,049 acres as alleged) within that part of the Crow Indian Reservation restored to entry April 11, 1882, which the defendant claims the right to select in satisfaction of mineral losses. Admits that all of said lands, with the exception of approximately 26,000

acres, are unsurveyed. Admits that in Exhibit DD there is contained a substantially correct description of said 358,049 acres, save that said description covers surveyed and unsurveyed lands without distinguishing between them, and the areas of un-
481 surveyed lands are estimated. Admits that in 1868 a reservation was created in the Territory of Montana for the Crow Indians, but alleges that the reservation was created on May 7, 1868, and not on October 17, 1868, as alleged. Admits that on June 27, 1881, the map of definite location of the line of the Northern Pacific Railroad through said reservation was filed. Admits that lands within said reservation and embraced within the primary limits of the land grant created by the Act of July 2, 1864, were excepted from said land grant. Admits that on April 11, 1882, certain of said lands were restored to the public domain. Admits that thereafter 364,500, not 358,049, acres of said lands situate within fifty miles of the line of the Northern Pacific Railroad were set apart and reserved by the plaintiff as forest reserves or national forests. Alleges that the 3,300 acres above referred to were withdrawn for forest purposes on January 29, 1904, and are a part of the Gallatin National Forest. A correct description of said 3,300 acres is s own on Exhibit 3 hereto attached and made a part of this answer. Admits that said reservations were made before any selection thereof had been filed by the Northern Pacific Railway Company, but alleges that most of said lands were and are unsurveyed, and under the rules of the Secretary of the Interior selections of unsurveyed lands were not permitted. In answer to plaintiff's allegation in regard to the ascertainment of deficiency in the acreage of the land grant defendant realleges Paragraph XX of this answer. Denies that defendant acquiesced in said withdrawals and alleges the fact to be that defendant repeatedly attempted to select lands in national forests, but its right to do so was denied by the Secretary of the Interior. Admits that the plaintiff has expended money in the administration of lands set forth in Exhibits O, Q and DD, but this defendant is without knowledge as to the sums so expended. Said expenditures were made with full knowledge of this defendant's claim to said lands. Save as aforesaid defendant denies the allegations contained in subdivision XXI.

XXII

Defendant says that the facts set forth in subdivision XXII, taken by themselves or supported by other facts alleged in the bill, are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint.

Answering subdivision XXII but without waiving the defenses thereto on points of law in this answer set forth:

Defendant admits that by Section 3 of the Act of May 5, 1864, a grant of lands was made by the United States to the State of Wisconsin to aid in the construction of a railroad from Portage City, Wisconsin, in a northwesterly direction to Bayfield, Wisconsin, and thence to Superior, Wisconsin, and admits that the benefits of said grant were extended by the State to the Portage, Winnebago & Superior Railroad. Admits that on the 10th day of November 1869, a map of definite location from Portage City through Ashland to Bayfield and thence to Superior was filed with the Interior Department by the Portage, Winnebago & Superior Railroad Company. Admits that said company constructed a railroad from Portage to Ashland and admits that no railroad was constructed by said company from Ashland to Bayfield or from Bayfield to Superior. Admits that on December 10, 1869, and February 2, 1870, withdrawals of public lands were made opposite the proposed railroad shown by said
482 map of definite location. Admits that thereafter the lands so withdrawn ceased to be unreserved public lands of the United States and continued in that status until forfeited to the United States by the Act of September 29, 1890 (26 Stat. 496).

On July 6, 1882, and November 24, 1884, the Northern Pacific Railroad Company filed maps of definite location between Ashland and Superior and afterwards constructed a railroad on the line established by said maps. Denies that the railroad so constructed between Ashland and Superior is upon the same general line as the railroad route of the Portage, Winnebago & Superior Railroad Company between Ashland, Bayfield, and Superior as established by said map of definite location of November 10, 1869. There is not now and never has been a railroad route of the Portage, Winnebago & Superior Railroad Company between Ashland and Bayfield and Superior. Denies that no lands were earned by the Northern Pacific Railroad Company by the construction of its railroad between Ashland, Wisconsin, and Superior, Wisconsin. Alleges that lands were earned and patents for most of said lands were issued to the Northern Pacific Railroad Company and to the Northern Pacific Railway Company many years ago. Admits that said lands were obtained in part in lieu of losses in place limits which the Northern Pacific Railroad Company or the Northern Pacific Railway Company claimed had resulted by reason of said withdrawals in favor of the Portage, Winnebago & Superior Railroad Company, and in part in lieu of land within said withdrawal limits lost to the Northern Pacific Railroad Company for other reasons. Admits that in Ex-

hibit R there is contained a substantially correct description of lands patented to the Northern Pacific Railway Company in lieu of lands within primary limits under the Act of July 2, 1864, and within primary limits of the grant to the State of Wisconsin by the Act of May 5, 1864, and a substantially correct description of other lands selected in lieu of lands relinquished under the Act of July 1, 1898, that had previously been selected in lieu of lands similarly lost to the grant and of selection rights outstanding because of lands relinquished under the Act of July 1, 1898, which had been selected in lieu of lands similarly lost to the grant. Alleges that said description is accompanied by introductory paragraphs containing irrelevant and immaterial statements of evidence and matters of argument. Defendant denies all matters contained in said Exhibit R except as above admitted. Admits that the Northern Pacific Railway Company and the Northern Pacific Railroad Company assumed complete ownership of said lands after patents had been received therefor, including the right of possession and the right to sell or lease said lands to third persons, and admits that extensive areas of said lands have been sold to third persons. Denies that any of the sums of money received from sales or leases or otherwise, rightfully belongs to the plaintiff. Save as aforesaid, defendant denies each and every allegation in said subdivision XXII contained.

Alleges that of the lands so received and listed in Exhibit R a portion was sold to bona fide purchasers. Exhibit 4 hereto attached and made a part of this answer shows the descriptions of said lands, dates of patents, dates of said sales, names of the bona fide purchasers, amounts received by the Northern Pacific Railroad Company and the Northern Pacific Railway Company from said purchasers directly or through a subsidiary company and dates of deeds to said purchasers.

483 Defendant says the plaintiff is barred from bringing suit to vacate and annul patents to or to recover any of the lands referred to in said subdivision, for the reason that said patents issued to the Northern Pacific Railroad Company or to the Northern Pacific Railway Company more than six years prior to the institution of this suit.

Defendant alleges that the Northern Pacific Railroad Company and the Northern Pacific Railway Company have not received, including these lands and including all lands erroneously patented, the full measure of the grant made by the Act of July 2, 1864, and there are not now and were not at the time of the issuance of the patents referred to in subdivision XXII sufficient lands within the place limits and in the indemnity limits avail-

able for selection, to satisfy the full measure of the grant. Defendant says that the plaintiff is estopped to claim any of the proceeds from said patented lands by the judgment and decree of the District Court of the United States for the Western District of Washington, Southern Division, in ten cases brought therein, wherein the United States was plaintiff and the Northern Pacific Railway Company and the Northern Pacific Railroad Company and others were defendants, said cases being numbered 1027 to 1034, inclusive, and 1036 and 1112. In the bill of complaint in each of said ten suits the United States alleged and in its answer to each bill the Northern Pacific Railroad Company admitted that the Northern Pacific Railway Company was a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, and that the Northern Pacific Railroad Company was a corporation duly organized, incorporated, and existing under and by virtue of the Act of July 2, 1864. In each of said bills of complaint it was alleged that through mistake of the officers of the Interior Department patents to lands had been issued to the Northern Pacific Railroad Company; that said lands in fact were excepted from the land grants of the Northern Pacific Railroad Company by virtue of adverse claims described in the bills of complaint; that the Northern Pacific Railroad Company or the Northern Pacific Railway Company had sold said lands to purchasers in good faith whose title had been confirmed by an Act of Congress of March 2, 1896, and that prior to the commencement of each suit the Secretary of the Interior had demanded of the defendant Northern Pacific Railway Company the sum of $1.25 per acre for all of said lands. It was claimed in said suits that the United States was entitled to recover this sum by virtue of the provisions of the Act of Congress of March 3, 1887 (24 Stat. 556), the Act of February 12, 1896 (29 Stat. 6), and the Act of March 2, 1896 (29 Stat. 42). Defendant Northern Pacific Railway Company in its answers denied that the patents had been issued through inadvertence or mistake and prayed for dismissal of the bills of complaint. These suits were subsequently tried and argued to the court. The defendant Northern Pacific Railway Company contended that there could be no recovery by the United States for the reason that it did not appear that the Northern Pacific Railroad Company and the Northern Pacific Railway Company had received, these lands included, the full measure of the grant to the Northern Pacific Railroad Company and it did not appear that there were sufficient lands within the limits of the grant to satisfy the full measure of the grant. On the 18th day of March, 1912, the court ordered that the complaint be dismissed and a

decree of dismissal was thereafter duly entered. The sole ground for dismissal stated by the court in its memorandum decision is as follows:

484 "In deciding the case I find it necessary to refer to only one point. In the case of United States vs. Winona and St. Peter Railroad Company, 165 U. S. 463, the Supreme Court refused to decree that the railroad company make payment to the government of the value of lands erroneously certified and patented, and after disposing of some preliminary objections, speaking by Mr. Justice Brewer said:

'But lastly and chiefly, that it does not appear from this record, either that the railroad company received an excess of lands, or has even received (these lands included) the full quantity of lands promised in the grant; and further that it does not appear that there were not within the granted or indemnity limits lands which the company might have rightfully received but for this erroneous certification. It will hardly be contended that, if, simply through a mistake of the land department, these lands were certified when at the time other lands were open to certification which could rightfully have been certified and which have since been disposed of by the Government to other parties, so that there is now no way of filling the grant, the Government can nevertheless recover the value of the lands so erroneously certified. In other words, the mistake of the officers of the Government cannot be both potent to prevent the railroad company obtaining its full quota of lands and at the same time potent to enable the Government to recover from the company the value of lands erroneously certified.'

"In the more recent case of Southern Pacific Railroad Company vs. United States (209 U. S. 354) referring to the same point, the court said:

'It appears from a stipulation of counsel that within the indemnity limits of the grant to the Southern Pacific Railroad there remain more than fifty thousand acres of surveyed public lands for which there has been no selection or application to select by the Company. So that there is no such equity in favor of the Company as was suggested in the case of United States vs. Winona and St. Peter Railroad Company (165 U. S. 463–482).'

"In the case at bar there is no evidence in the record to cover the point which the Supreme Court has said it is necessary for the government to cover in order to make out an equitable right to be paid the value of lands erroneously certified. In the case of the Northern Pacific land grant, as in the grant involved in the Winona Case, the Statute provides that in the event that any lands within the grant shall prove to be otherwise disposed of,

other lands shall be selected by the company, within certain indemnity limits, in lieu thereof. There is absolutely no showing here as to the status of the land grant at the time this 160-acre tract was patented and no showing whether as a matter of fact the United States lost anything or the railroad company gained anything by reason of the erroneous patenting of this tract. The Supreme Court has held that the burden is on the government to show the facts in this respect and the resulting equity. On the record submitted to me and the decisions of the Supreme Court just cited, I must hold that the government has not shown an equitable right to recover."

No appeal was taken by the United States from the judgment entered in any of the ten cases and said judgments became final.

For a further defense to subdivision XXII, defendant says the United States is estopped to question the validity of patents issued to the Northern Pacific Railroad Company and the Northern Pacific Railway Company for the lands referred to in said subdivision XXII, for the reason that thirty-five years ago the precise issue raised in subdivision XXII was considered by Secretary of the Interior Hoke Smith, and the Secretary decided that the proviso in Section 3 of the Act of July 2, 1864, reading,

"That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act"

485 is applicable only when the company having the earlier grant has actually constructed its railroad. The decision of the Secretary is reported in 21 L. D. 412, 417. Thereafter and pursuant to this decision said Secretary of the Interior and succeeding Secretaries approved the issuance of patents to the Northern Pacific Railroad Company and to the Northern Pacific Railway Company for the lands referred to in said subdivision XXII and said decision has never been reversed or modified, or questioned by the United States before the institution of this suit.

For a further defense to subdivision XXII, defendant alleges that if it should be held that defendant Northern Pacific Railroad Company or defendant Northern Pacific Railway Company was not entitled to receive said patented lands as indemnity for losses due to withdrawals for the Portage, Winnebago & Superior Railroad Company, nevertheless said defendant Northern Pacific Railroad Company or the defendant Northern Pacific Railway Company was at the time said patents issued entitled to receive said lands as indemnity for the loss of other lands within place limits, and defendant in equity ought now to be permitted to sub-

stitute in support of said patented selections other valid losses which never have been and never can be satisfied otherwise.

XXIII

Defendant says that the facts set forth in subdivision XXIII, taken by themselves or supported by other facts alleged in the bill, are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint.

Without waiving the defenses on points of law in this answer set forth, defendant alleges that the facts with reference to the matters referred to in subdivision XXIII are these:

The Northern Pacific Railroad Company, pursuant to the terms of the Joint Resolution of May 31, 1870, on September 22, 1882, filed a map of definite location of a railroad between Portland, Oregon, and a point in Oregon opposite Kalama, Washington, a distance of 36.3 miles. Subsequently the Secretary of the Interior withdrew every alternate section of public land designated by odd numbers to the amount of ten sections per mile on each side of the line so definitely located. The Northern Pacific Railroad Company built the line so located with the exception of approximately one mile at or near Portland. Defendant admits that the Secretary of the Interior thereafter approved patents to certain lands hereinafter described, as though said unconstructed mile of line had in fact been constructed. The Commissioner of the General Land Office in the course of his investigation of the Northern Pacific land grants, subsequent to the decision of the Supreme Court in United States vs. Northern Pacific Railway Company, 256 U. S. 51, made for the purpose of complying with said decision, discovered this error and held in his tentative adjustment of December 19, 1923, that there should be deducted from the measure of the grant as he had computed it the 11,424.48 acres included by reason of said error. The Northern Pacific Railway Company in commenting on the tentative adjustment of December 19, 1923, in its brief filed with the Commissioner of the General Land Office agreed that the error should be corrected.

The Northern Pacific Railroad Company and the Northern Pacific Railway Company have received patents for 1,276.54 acres of p. ace lands opposite the unconstructed portion of the line, and in addition the Northern Pacific Railway Company relinquished claims to 120 acres of place lands opposite the unconstructed line under the Act of July 1, 1898 (30 Stat. 620)
486 and selected 120 acres of other lands and received patents therefor, making a total of 1,396.54 acres. For lands excepted from the grant by reason of adverse claims in place limits

opposite the unconstructed line, the Northern Pacific Railroad Company and Northern Pacific Railway Company received as indemnity, patents for 1280 acres located in the State of Washington opposite the constructed line between Portland and Tacoma, and for other lands excepted from the grant by reason of adverse claims in place limits opposite the unconstructed line, indemnity lands to the amount of 560.99 acres were selected opposite the constructed line, claims to which indemnity lands were subsequently relinquished under the Act of July 1, 1898, and May 17, 1906 (34 Stat. 197), and patents received for lands selected in lieu thereof, making a total of 1,840.99 acres received on account of losses in place limits opposite the unconstructed line. The Northern Pacific Railroad Company and the Northern Pacific Railway Company also received patents for 968.40 acres in the first indemnity limits opposite said unconstructed line on account of losses occurring opposite the constructed railroad, and under said Act of July 1, 1898, relinquished claims to 1,946.53 acres in said indemnity limits, which lands were claimed on account of losses occurring opposite the constructed line. Patents were received for other lands in lieu of the claims to indemnity lands so relinquished. The lands herein referred to are shown on Exhibit S attached to the bill of complaint. Alleges that the description of said lands in Exhibit S is accompanied by introductory paragraphs containing irrelevant and immaterial statements of evidence and matters of argument. Defendant denies all matters contained in said Exhibit S except as above admitted. Admits that defendant Northern Pacific Railroad Company and defendant Northern Pacific Railway Company assumed complete ownership of said lands. Denies that any of the sums of money received from sales, or received through leases or otherwise, rightfully belongs to the plaintiff. Defendant admits that by the Act of September 29, 1890, granted lands opposite unconstructed railroads were declared forfeited to the United States.

Save as aforesaid, defendant denies each and every allegation in said subdivision XXIII contained.

Alleges that of the lands so received and listed in Exhibit S a portion has been sold to bona fide purchasers. Exhibit 5 hereto attached and made a part of this answer shows the description of said lands, dates of patents, dates of said sales, names of bona fide purchasers, amounts received by the Northern Pacific Railroad Company and the Northern Pacific Railway Company from said purchasers and dates of deeds to said purchasers.

Defendant says the plaintiff is barred from bringing suit to vacate and annul patents to or to recover any of the lands re-

ferred to in said subdivision, for the reason that said patents issued to the Northern Pacific Railroad Company or to the Northern Pacific Railway Company more than six years prior to the institution of this suit.

Defendant alleges that the Northern Pacific Railroad Company and the Northern Pacific Railway Company have not received, including these lands, and including all lands erroneously patented, the full measure of the grant made by the Joint Resolution of May 31, 1870, and there are not now and were not at the time of the issuance of the patents referred to in sub-
487 division XXIII sufficient lands within the place limits and in the indemnity limits available for selection, to satisfy the full measure of the grant. Defendant says that the plaintiff is estopped to claim any of the proceeds from said patented lands by the judgment and decree of the District Court of the United States for the Western District of Washington, Southern Division, in ten suits brought therein, wherein the United States was plaintiff and the Northern Pacific Railway Company and the Northern Pacific Railroad Company and others were defendants, and realleges all that part of paragraph XXII of this answer which relates to said suits and is set forth beginning at line 10, page 40, and ending with line 31, page 41.

With reference to all lands within indemnity limits opposite the constructed line that were patented as indemnity for lands lost in place limits opposite said unconstructed line and with ferer-ence to all indemnity selections for such losses, claims to which have been relinquished under the Acts of July 1, 1898, and May 17, 1906, defendant in equity ought now to be permitted to substitute in support of said patented and relinquished selections other valid losses which never have been and never can be satisfied otherwise.

XXIV.

Defendant says that the facts set forth in subdivision XXIV, taken by themselves or supported by other facts alleged in the bill, are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint.

Without waiving the defenses on points of law in this answer set forth, defendant alleges that the facts with reference to the matters referred to in subdivision XXIV are these:

On June 29, 1883, the Northern Pacific Railroad Company filed its map of definite location for that part of its branch line over the Cascade Mountains extending easterly from Yakima City to a point of junction with the main line near Ainsworth on the left bank of the Columbia River. Ainsworth is shown on this

map of definite location at a point about three miles east of the actual junction of the main and branch lines. The Secretary of the Interior established the terminal line at or near Ainsworth instead of at the actual point of junction of the main and branch lines now known as Pasco. The Commissioner of the General Land Office in the course of his investigation of the Northern Pacific land grant subsequent to the decision of the Supreme Court in United States vs. Northern Pacific Railway Company, 256 U. S. 51, made for the purpose of complying with said decision, discovered this error and held in his tentative adjustment of December 19, 1923, that there should be deducted from the measure of the grant as he had computed it the 41,415.38 acres included in the measure of the grant by reason of the error in fixing the terminal line. The Northern Pacific Railway Company, in commenting on the tentative adjustment of December 19, 1923, in its brief filed with the Commissioner of the General Land Office, agreed that the error should be corrected.

The Northern Pacific Railroad Company and the Northern Pacific Railway Company have received patents for 33,335.16 acres of place lands opposite to and on account of that portion of the three miles of line erroneously considered part of the branch line, and the Northern Pacific Railway Company relinquished in said place limits 6,554.43 acres under the Act of July 1, 1898 (30 Stat. 620), and the Act of May 17, 1906
488 (34 Stat. 197), for which patents for 6,544.38 acres have been received for lands selected in lieu thereof. The Northern Pacific Railway Company also relinquished 160 acres under the same Acts for which no lieu selections have been made. In said place limits there were excepted from the supposed grant by adverse claims 1,325.72 acres, but no indemnity has been selected therefor. Within said place limits the Northern Pacific Railway Company has selected 119.98 acres as indemnity for losses incurred opposite portions of constructed line and patents have been received therefor. Within the indemnity limits opposite said three miles of line the Northern Pacific Railroad Company and the Northern Pacific Railway Company have received patents for 13,408.99 acres selected as indemnity for losses incurred opposite constructed line and in said indemnity limits said companies selected 8,200.49 acres as indemnity for losses incurred opposite constructed line, but subsequently relinquished claims to this acreage under the Acts of July 1, 1898, and May 17, 1906, and received patents for lands selected in lieu thereof.

Admits that defendant Northern Pacific Railroad Company and this defendant assumed complete ownership of said lands and that said lands are shown on Exhibit T attached to the bill of

complaint. Denies that any of the sums of money received from sales or received through leases or in any other way from said lands belongs to the plaintiff. Alleges that the description of said lands in Exhibit T is accompanied by introductory paragraphs containing irrelevant and immaterial statements of evidence and matters of argument. Defendant denies all matters contained in said Exhibit T except as above admitted.

Save as aforesaid, defendant denies each and every allegation in said subdivision contained.

Alleges that of the lands so received and listed in Exhibit T a portion has been sold to bona fide purchasers. Exhibit 6 hereto attached and made a part of this answer shows the description of said lands, dates of patents, dates of said sales, names of bona fide purchasers, amounts received by the Northern Pacific Railroad Company and the Northern Pacific Railway Company from said purchasers, and dates of deeds to said purchasers.

Defendant says the plaintiff is barred from bringing suit to vacate and annul patents to or to recover any of the lands referred to in said subdivision, for the reason that said patents issued to the Northern Pacific Railroad Company or to the Northern Pacific Railway Company more than six years prior to the institution of this suit.

Defendant alleges that the Northern Pacific Railroad Company and the Northern Pacific Railway Company have not received, including these lands, and including all lands erroneously patented, the full measure of the grant made by the Act of July 2, 1864, and there are not now and were not at the time of the issuance of the patents referred to in said subdivision sufficient lands within the place limits and in the indemnity limits available for selection, to satisfy the full measure of the grant. Defendant says that the plaintiff is estopped to claim any of the proceeds from said patented lands by the judgment and decree of the District Court of the United States for the Western District of Washington, Southern Division, in ten suits brought therein, wherein the United States was plaintiff and the Northern Pacific Railway Company and the Northern Pacific Railroad Company and others were defendants. Defendant realleges that portion of paragraph XXII of this answer which relates to said suits and is set forth beginning at line 10, page 40, and ending with line 31, page 41.

489 XXV

Defendant says that the facts set forth in subdivision XXV, taken by themselves or supported by other facts alleged in the bill, are insufficient to constitute a valid cause of action in equity

or to support any cause of action attempted to be set forth in the bill of complaint.

Without waiving the defenses on points of law in this answer set forth, defendant alleges that the facts with reference to the matters referred to in subdivision XXV are these:

The Commissioner of the General Land Office in his tentative adjustment of December 19, 1923, called attention to the fact that an error had been made in fixing the lateral limits of the grant under the Act of July 2, 1864, in the States of Montana and Idaho and suggested that this error be corrected. The Northern Pacific Railway Company in its brief commenting on this tentative adjustment acquiesced in this suggestion.

In the year 1926 the Commissioner of the General Land Office prepared a map upon which he delineated new limits of the land grant pursuant to his suggestion of December 19, 1923. The total area of the odd numbered sections within the place limits of the grant as shown on his map of 1926 is approximately 145,000 acres less than the total area of the odd numbered sections shown in the place limits of the grant as originally fixed by the Commissioner. Defendant denies that it has received 145,000 acres of land because of said error in delineating the limits of its grant through the States of Montana and Idaho, or any other quantity of land, except that it did receive patents for 8,984.88 acres within the second indemnity limits of its land grant as originally laid down by the Commissioner, which fall outside of the second indemnity limits as now reestablished.

Defendant alleges that the Northern Pacific Railroad Company and the Northern Pacific Railway Company received patents for 106,071.71 acres of land as place lands, which now fall within the first indemnity limits as reestablished; that there are 7,756.16 acres of lands in the original place limits, for which no patents have been received, that now lie within the first indemnity limits as reestablished; that there are 80 acres of unsurveyed lands within the original place limits which now fall within the first indemnity limits as reestablished; that the Northern Pacific Railway Company relinquished claims to 756.10 acres of lands within the original place limits under the Act of June 22, 1874 (18 Stat. 194), and the Act of July 1, 1898, for which 754.51 acres of lands were subsequently patented to this defendant in lieu of the lands so relinquished. Defendant alleges that 32,987.20 acres of lands within the original place limits were classified as mineral and the classification approved by the Secretary of the Interior; that 120 acres were excepted from the original place limits on account of adverse claims; that 1,040 acres were excepted from the original place limits by withdrawal for the Flathead

Indian Reservation; and that said lands now lie within first indemnity limits as reestablished.

Defendant alleges that within the first indemnity limits as originally established there are 360 acres which are now within the place limits as reestablished, and for these lands a patent has been received; that there are 440 acres within the place limits as reestablished which were formerly within first indemnity limits for which no patents have been received; that there are 560.76 acres within the original first indemnity limits
490 that were classified as mineral and the classification approved that are now within place limits as reestablished; that there are 30,331.92 acres of lands within the second indemnity limits as reestablished that were patented to the Northern Pacific Railroad Company and to this defendant as lands falling within the original first indemnity limits; that there are 560 acres of lands within the original first indemnity limits that now fall within the second indemnity limits as reestablished for which no patents have been received, and that there are 831.13 acres of lands within the original first indemnity limits that were relinquished under the Act of July 1, 1898, for which 829.01 acres have been received in lieu of the lands relinquished. The lands referred to in this paragraph are shown by legal subdivisions on Exhibit 7 which is hereto attached and made a part of this answer. Admits that Exhibit U contains a substantially correct description of the lands referred to in subdivision XXV of the bill, but denies that said exhibit correctly shows the situation resulting from the change in lateral limits. Alleges that that descriptions contained in Exhibit U are accompanied by numerous paragraphs containing irrelevant and immaterial statements of evidence and matters of argument. Defendant denies all matters contained in said Exhibit U except as above admitted. Admits that defendant Northern Pacific Railroad Company and this defendant assumed complete ownership of said lands. Denies that any of the sums of money received from sales or received through leases or in any other way from these lands, belongs to the plaintiff.

Save as aforesaid, defendant denies each and every allegation in subdivision XXV contained.

Defendant alleges that the lands which were patented to the Northern Pacific Railroad Company and to this defendant as place lands, which now fall within first indemnity limits as reestablished, should in fact have been patented as indemnity lands, and there are today unsatisfied losses under the grant made by the Act of July 2, 1864, sufficient in quantity to support the selection of these lands as indemnity lands and defendant should

in equity now be permitted to submit such losses in support of said patents.

As to the lands within first indemnity limits as originally established, which now fall within reestablished second indemnity limits, defendant alleges that a portion of these lands was rightfully patented to the Northern Pacific Railroad Company and to this defendant because the losses offered to support their selection as indemnity lands are legally sufficient to support selections either in first indemnity limits or second indemnity limits, and alleges that as to the remainder of said lands defendant ought now in equity to be permitted to substitute in support of said patents valid losses which have not been satisfied, but which can properly be satisfied, within second indemnity limits.

Defendant alleges that of the lands listed in Exhibit U as patented to the Northern Pacific Railroad Company or the Northern Pacific Railway Company a portion has been sold to bona fide purchasers. Exhibit 8 hereto attached and made a part of this answer shows the descriptions of said lands, dates of patents, dates of said sales, names of the bona fide purchasers, amounts received by the Northern Pacific Railroad Company and the Northern Pacific Railway Company from said purchasers and dates of deeds to said purchasers.

Defendant says the plaintiff is barred from bringing
491 suit to vacate and annual patents to or to recover any of the lands listed in said Exhibit U and shown as patented to the Northern Pacific Railroad Company or the Northern Pacific Railway Company, for the reason that said patents issued to the Northern Pacific Railroad Company or to the Northern Pacific Railway Company more than six years prior to the institution of this suit.

Defendant alleges that the Northern Pacific Railroad Company and the Northern Pacific Railway Company have not received, including lands listed in said Exhibit U and including all lands erroneously patented, the full measure of the grant made by the Act of July 2, 1864, and there are not now and were not at the time of the issuance of the patents referred to in said Exhibit U sufficient lands within the place limits and in the indemnity limits available for selection, to satisfy the full measure of the grant. Defendant says the plaintiff is estopped to claim any of the proceeds from said patented lands by the judgment and decree of the District Court of the United States for the Western District of Washington, Southern Division, in ten suits brought therein, wherein the United States was plaintiff and the Northern Pacific Railway Company and the Northern Pacific Railroad Company and others were defendants, and realleges that portion

of paragraph XXII of this answer which relates to said suits and is set forth beginning at line 10, page 40, and ending with line 31, page 41.

XXVI

Defendant says that the facts set forth in subdivision XXVI, taken by themselves or supported by other facts alleged in the bill, are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint.

Answering subdivision XXVI, but without waiving any of the defenses on points of law in this answer set forth:

Defendant denies that the provisions of the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, with reference to the construction of the main line railroad and the branch line of railroad therein referred to are correctly summarized in said subdivision, and for a correct statement of the terms of the Act and the Joint Resolution defendant begs to refer to the Act and to the Joint Resolution. Admits that on or about the 30th day of July, 1870, the Northern Pacific Railroad Company filed with the Secretary of the Interior two separate maps of general route. Alleges that said maps were filed with the Commissioner of the General Land Office on August 13, 1870. Admits that said maps show the lines of railroad referred to in said subdivision. Admits that on or about the 16th day of February, 1872, the Northern Pacific Railroad Company filed with the Secretary of the Interior an amended map of general route and alleges that said map was filed with the Commissioner of the General Land Office on February 21, 1872. Admits that the general route shown on said map was substantially as alleged. Admits that withdrawals of public lands opposite the line of general route were made. Admits that at no time between July 30, 1870, and October 4, 1880, did the Northern Pacific Railroad Company advise the Secretary of the Interior that there would not be constructed a railroad from the mouth of the Walla Walla River down the valley of the Columbia River to a point at or near Portland, Oregon. Alleges that the Northern Pacific Railroad Company during that time did not know that no line would be so constructed and further that no obligation rested upon
492 the Northern Pacific Railroad Company to give any information to the Secretary of the Interior other than that specifically called for by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870. Alleges that on October 20, 1880, the Northern Pacific Railroad Company entered into a contract with the Oregon Railway & Navigation Company by the terms of

which the Northern Pacific Railroad Company was given the right to use the railroad of the Oregon Railway & Navigation Company between the mouth of the Walla Walla River and Portland via the valley of the Columbia River. Alleges that said contract shortly after its execution became a matter of common knowledge and was known to the Congress of the United States and to the Secretary of the Interior and other responsible officers of the United States. Alleges that on October 4, 1880, the Northern Pacific Railroad Company filed with the Commissioner of the General Land Office a map of definite location covering the main line of railroad between Spokane Falls and the town of Wallula, Washington, situate at the mouth of the Walla Walla River. Admits a railroad was thereafter constructed on the line indicated on said map. Denies that under the provisions of the Act of July 2, 1864, or the Joint Resolution of May 31, 1870, the Northern Pacific Railroad Company was obliged to construct a main line of railroad down the valley of the Columbia River. Denies that any misrepresentations were made to the Secretary of the Interior in connection with said map of definite location. Admits that no map of definite location of a railroad from Wallula, Washington, down the valley of the Columbia River to Portland was filed and admits that the Northern Pacific Railroad Company never constructed such a railroad. Alleges that the Northern Pacific Railroad Company selected Tacoma on Puget Sound as the western terminus of said railroad. Denies that by said Act of July 2, 1864, or the Joint Resolution of May 31, 1870, the Northern Pacific Railroad Company was required to construct its main line of railroad to its western terminus upon the most direct and practicable line without unnecessary deviation, and for a correct description of the route on which the Northern Pacific Railroad Company was authorized to construct, defendant begs to refer to said Act and to said Joint Resolution. Denies that the map of definite location of October 4, 1880, was approved by the Secretary of the Interior diverso intuitu. Alleges that after the construction of said main line from Spokane Falls to Wallula Commissioners were duly appointed as provided in Section 4 of the Act of July 2, 1864, and these Commissioners examined said line and made a favorable report thereon and all of said line was accepted by the President of the United States on November 17, 1881. Thereafter patents to odd numbered sections in the place limits and in the indemnity limits opposite said line of railroad were approved by the Secretary of the Interior and said patents issued to the Northern Pacific Railroad Company and the Northern Pacific Railway Company pursuant to Section 4 of the Act of July 2,

1864, from time to time over a period of approximately thirty years.

Alleges that maps of definite location of the branch line were filed with the Commissioner of the General Land Office by the Northern Pacific Railroad Company on June 29, 1883, May 24, 1884, March 26, 1884, September 3, 1884, and December 8, 1884, each map being for a section of the branch line, and said maps were duly approved by the Secretary of the Interior. Said branch line of railroad was constructed on the line estab-
493 lished by said maps of definite location, was examined by Commissioners as provided in Section 4 of the Act of July 2, 1864, was favorably reported on by said Commissioners, and was accepted by the President of the United States. Said branch line railroad was accepted in sections and the last section was accepted by the President of the United States on June 13, 1887. Thereafter patents to odd numbered sections in place limits and in indemnity limits opposite said branch line of railroad were approved by the Secretary of the Interior and said patents issued to the Northern Pacific Railroad Company and the Northern Pacific Railway Company pursuant to Section 4 of the Act of July 2, 1864, from time to time over a period of approximately thirty years. Since the completion of said branch line from Tacoma, Washington, to Pasco, Washington, said branch line and the main line between Pasco and Spokane have been used in the operation of through passenger and freight trains. Said main line passes through Spokane, Lind, and Pasco, and said branch line extends through Ellensburg and ends at Tacoma. Denies that the line across the State of Washington, comprised of the main line from Spokane to Pasco and the branch line from Pasco to Tacoma is unduly circuitous. Alleges that the line from Spokane to Wallula is a portion of the main line that the Northern Pacific Railroad Company was authorized to construct from Lake Superior to Puget Sound via the valley of the Columbia River. Alleges that the Joint Resolution of May 31, 1870, did not fix the junction point of the branch line and the main line at Spokane or at any other point, but provided that it should be at some convenient point. Alleges that said branch line from Pasco to Tacoma is the branch line which the Northern Pacific Railroad Company was authorized to construct by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, and was constructed and accepted as such.

Denies that the measure of the grant through the State of Washington can be fixed by some imaginary line of railroad between Spokane and Tacoma. Denies that in computing the measure of the grant for the lines of railroad constructed by the

Northern Pacific Railroad Company in the State of Washington the Department of the Interior made errors in any way connected with the location of said lines. Denies that any patents in this subdivision alleged to have been erroneously issued were issued through error or mistake of law or fact. Admits that the Northern Pacific Railroad Company and this defendant assumed complete ownership of lands, patents to which were issued on account of lines of railroad constructed by the Northern Pacific Railroad Company in the State of Washington. Admits that many thousands of acres of said lands have been sold to third persons. Denies that any of the sums of money received from sales or received through leases or otherwise, rightfully belongs to the plaintiff.

Save as aforesaid, defendant denies each and every allegation in subdivision XXVI contained, including the matter in Exhibit V.

Alleges that of the lands listed in Exhibit V attached to the bill of complaint a portion has been sold to bona fide purchasers. Exhibit 9 attached hereto and made a part of this answer shows the descriptions of said lands, dates of patents, dates of said sales, names of the bona fide purchasers, amounts received by the Northern Pacific Railroad Company and the Northern Pacific Railway Company from said purchasers directly or through a subsidiary company and dates of deeds to said purchasers.

494 Defendant says that the United States is estopped to claim that the measure of the grant is fixed by any line, other than that on which the railroad was actually constructed, by the decision of the Supreme Court of the United States in the case of United States vs. Northern Pacific Railway Company, reported in 256 U. S. 51. Defendant realleges that part of paragraph II–B of this answer which begins at line 29, page 14, and ends with line 33, page 15. Defendant alleges that the question of the true measure of the grant was within the issues in said suit, was litigated and decided. On this point the Supreme Court held:

"The aggregate of the odd-numbered sections within the place limits is the correct measure of the grant, unless (a) part of the grant included only a moiety of those sections, or (b) the route of this road and that of another with a prior land grant were found to be upon the same general line, in which event a stated deduction was to be made from the amount of land granted to this company" (p. 68).

Defendant says that the United States is estopped to question or complain of the location of the branch line from Pasco to Tacoma by the decision of the Supreme Court of the United

States in the case of Northern Pacific Railway Company v. De Lacey, reported in 174 U. S. at page 622. That case was an action of ejectment brought by the Railway Company against De Lacey to recover possession of 160 acres of land situated not far from Tacoma in the State of Washington. From the statement of facts in the opinion of the Supreme Court it appears that:

"The land lies within the primary limits of the land grant both of the main line of the railroad of plaintiff in error, as definitely located between Portland and Puget Sound, and the Cascade branch, as definitely located between the point where the railroad leaves the main line and crosses the Cascade Mountains to Puget Sound" (p. 622).

The United States filed a brief in the Supreme Court by the Solicitor General and an Assistant Attorney General in which the United States contended that the Railway Company was not entitled to the land in controversy because of an alleged preëmption claim excepting said land from the grant of 1864. The court held:

"The grant of lands to aid the construction of that portion of the main line of the railroad of the plaintiff in error, between Portland and Puget Sound, dates from the joint resolution of May 31, 1870, and prior to that time there was no land grant in aid of the construction of that portion of the road. United States v. Northern Pacific Railroad Company, 152 U. S. 284, 292.

"At the time of the adoption of the resolution of 1870 there had been filed, April 9, 1869, in the local land office the statement of John Flett, declaring his intention to purchase the lands in dispute under the laws of the United States authorizing the preëmption of unoffered lands, and that entry being unforfeited and uncancelled, operated to except the lands from that grant. We may therefore confine our attention to the grant under the act of July 1864 and the subsequent proceedings which relate to that grant" (p. 626).

The Supreme Court held that the Northern Pacific Railroad Company had earned the land in controversy as a part of its grant under the Act of July 2, 1864, by the construction of said branch line.

Defendant says that the United States is estopped to question or complain of the location of the branch line from Pasco to Tacoma by the decision of the United States Circuit Court for the District of Washington, Western Division, in the case therein pending, numbered 600, wherein United States of America was complainant and Northern Pacific Railroad Company, 995 Frank G. Bigelow, Edwin H. McHenry, and Andrew F. Burleigh, as receivers of said company, and the Northern

Pacific Railway Company were defendants. That suit was an action to cancel and annul the patent issued to the Northern Pacific Railroad Company for the same land involved in said case of Northern Pacific Railway Company v. De Lacey, 174 U. S. page 622. The court held:

"This matter coming on upon the motion of Edward E. Cushman, Assistant United States Attorney, for an order to dismiss the bill in the above-entitled cause, and H. M. Stephens appearing for the defendants, and it appearing to the court that the same issues concerning the same lands were involved in the case of Northern Pacific Railway Company vs. De Lacey, in which suit the United States appeared in the Supreme Court of the United States, and which suit was decided adversely to the Government and respondents, and the court being fully advised:

"It is therefore ordered and adjudged that this cause, and the bill therein, be, and the same is hereby dismissed."

A decree of dismissal was thereafter duly entered. No appeal was taken by the United States from the judgment entered and said judgment became final.

Defendant says that the United States is estopped to question or complain of the location of said branch line, for the reason that in 1885 while said branch line was under construction the United States made a treaty with the Yakima Indians, whose reservation the branch line crossed, providing for conveyance by the Yakima Indians to the Northern Pacific Railroad Company of a right-of-way and sundry station grounds and for payment by the Northern Pacific Railroad Company of the sum of $8,295.80 to the Yakima Indians. On March 3, 1893, this treaty was approved by Congress (27 Stat. 631) and thereby the United States required the Northern Pacific Railroad Company to pay the Yakima Indians for a part of the right-of-way, the location of which the United States in this suit is attempting to question. Thereafter said sum of $8,295.80 was duly paid to the United States.

Defendant says the plaintiff is estopped to question or complain of the location of the lines of railroad constructed by the Northern Pacific Railroad Company in the State of Washington, for the reason that all of the facts relating to the location and construction of said lines and all of the facts made a subject of complaint in subdivision XXVI of the bill have been known to the plaintiff for more than forty years, and never prior to the institution of this suit has any complaint of any kind or description about the location of said lines been made by the United States, during all of which time the United States has accepted all of the benefits of the construction and operation of said lines and has exacted from the Northern Pacific Railroad Company

and from the Northern Pacific Railway Company reduced rates for the transportation of the mails, troops, and supplies of the United States over said lines.

Defendant says the plaintiff is barred from bringing suit to vacate and annul patents to or to recover any of the lands referred to in said Exhibit V, for the reason that said patents issued to the Northern Pacific Railroad Company or the Northern Pacific Railway Company more than six years prior to the institution of this suit.

Defendant alleges that the Northern Pacific Railroad Company and the Northern Pacific Railway Company have not received, including the lands referred to in said Exhibit V and in-
495½ cluding all lands erroneously patented, the full measure of the grant made by the Act of July 2, 1864, and alleges that there are not now and were not at the time of the issuance of the patents referred to in said Exhibit V sufficient lands within the place limits and in the indemnity limits available for selection, to satisfy the full measure of the grant. Defendant says the plaintiff is estopped to claim any of the proceeds from said patented lands by the judgment and decree of the District Court of the United States for the Western District of Washington, Southern Division, in ten suits brought therein, wherein the United States was plaintiff and the Northern Pacific Railway Company and the Northern Pacific Railroad Company and others were defendants, and realleges that portion of paragraph XXII of this answer which relates to said suits and is set forth beginning at line 10, page 40, and ending with line 31, page 41.

XXVII

Defendant says that the facts set forth in subdivision XXVII, taken by themselves or supported by other facts alleged in the bill, are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint.

Answering subdivision XXVII, but without waiving any of the defenses on points of law in this answer set forth:

Defendant admits that the primary limits of the grant for the main line, based upon the map of general route of July 30, 1870, overlap the primary limits of the grant for the branch line from Pasco to Tacoma, as fixed by the map of definite location of said branch line, at or near Pasco. Admits that in the administration of the grants made by the Act of July 2, 1864, the Secretary of the Interior credited to said branch line only a moiety of the lands within said overlap, but alleges that said method of

administration was not adopted by the Secretary of the Interior until after the passage of the Act of September 29, 1890 (26 Stat. 496). Admits that Section 6 of said Act of September 29, 1890, reads as set forth in said subdivision XXVII. Denies that any main line moiety lands were forfeited by the Act of September 29, 1890, and alleges that no attempt was ever made to label any lands as main line moiety lands prior to September 29, 1890. The designation of main line moiety lands was due to an erroneous interpretation of the Act of July 2, 1864, by the Secretary of the Interior. Admits that lands having a total area of approximately 476,990.08 acres were, subsequent to September 29, 1890, designated as main line moiety lands. Admits that of said total area of 476,990.08 acres, more or less, a part was patented to the Northern Pacific Railroad Company and to the Northern Pacific Railway Company as place lands, and a part was selected in lieu of losses claimed to have occurred within primary limits of the branch line grant. Admits that Exhibit W attached to the bill of complaint contains a substantially correct schedule of said lands by numerical description. Alleges that said description is accompanied by introductory paragraphs containing irrelevant and immaterial statements of evidence and matters of argument. Defendant denies all matters contained in said Exhibit W except as above admitted. Admits that upon the issuance of said patents the Northern Pacific Railroad Company and subsequently the Northern Pacific Railway Company assumed complete ownership of said lands and sold some and leased other of said lands to third persons. Denies that any of the sums of money received from sales or received through leases or otherwise, rightfully belongs to the plaintiff.

496 Save as aforesaid, defendant denies each and every allegation in said subdivision XXVII contained.

Defendant says that the United States is estopped to claim that any of the lands listed in Exhibit W should be reconveyed to the United States or that the proceeds of the sales of any such lands should be paid to the United States, because of these facts:

On March 1, 1901, the United States filed a bill of complaint in the Circuit Court of the United States for the District of Oregon in a suit in which the United States was complainant and the Northern Pacific Railway Company was defendant, numbered 2664, in which it was alleged that a certain section of land located in said overlap had been erroneously patented to the Northern Pacific Railroad Company in that said section of land was a part of the main line moiety lands so-called. The bill prayed for a decree for the sum of $800 at the rate of $1.25 for each acre of said land which it was further alleged had been sold to a bona fide purchaser. The Northern Pacific Railway Com-

pany in its answer filed April 1, 1901, admitted that the land had been patented to the Northern Pacific Railroad Company and admitted that the land had been sold by the Northern Pacific Railway Company to a bona fide purchaser. The defendant denied that the land had been erroneously patented and claimed that it was rightfully patented to the Northern Pacific Railroad Company under the Act of July 2, 1864, by virtue of the construction of the branch line from Pasco to Tacoma. On April 1, 1905, the suit was dismissed on motion of the complainant. On April 10, 1905, the Attorney General advised the Secretary of the Interior that he had caused the suit to be dismissed because it was concluded that a suit to recover the value of lands by reason of this alleged overlap could not be maintained. On April 25, 1905, the Secretary of the Interior advised the Commissioner of the General Land Office that thereafter in the adjustment of the grant of July 2, 1864, the Railway Company must be credited for the full amount of the odd numbered sections within the primary limits of its constructed branch line. On May 31, 1905, the Commissioner of the General Land Office directed local land officers to make no further disposition of lands within the odd numbered sections within the primary limits or of any selected lands within the indemnity limits of said Company's constructed branch line within said overlap. On May 17, 1906, there was approved an Act of Congress (34 Stat. 197), entitled, "An act for the relief of certain entrymen and settlers within the limits of the Northern Pacific Railway land grant." Said Act reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the act of July first, eighteen hundred and ninety-eight (Thirtieth Statutes, pages five hundred and ninety-seven and six hundred and twenty), which provided for the adjustment by the Land Department of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company, and also the provisions of the act of March second, nineteen hundred and one, entitled 'An act for the relief of settlers under the public land laws to lands within the indemnity limits of the grant to the Northern Pacific Railroad Company,' be, and they thereby are, extended to include any bona fide settlement or entry made subsequent to January first, eighteen hundred and ninety-eight, and prior to May thirty-first, nineteen hundred and five, in accordance with the erroneous decision of the Land Department respecting the withdrawal on general route of the Northern Pacific Railroad between Wallula, Washington, and Portland, Oregon, where the same has not since been

497 abandoned: Provided, That all lieu selections made under this act shall be confined to lands within the State where the private holdings are situated.

"SEC. 2. That this act shall become effective upon an acceptance thereof by the Northern Pacific Railway Company being filed with the Secretary of the Interior."

An acceptance of said Act was duly filed by the Northern Pacific Railway Company with the Secretary of the Interior, and since the filing of said acceptance relinquishments have been made on demand of the Secretary of the Interior and lieu selections made for the relinquished lands during a period of approximately 25 years. Alleges that said Act and its acceptance constitute a contract within the protection of the Fifth Amendment to the Constitution of the United States.

Defendant alleges that of the lands listed in Exhibit W a portion has been sold to bona fide purchasers. Exhibit 10 attached hereto and made a part of this answer shows the descriptions of said lands, dates of patents, dates of said sales, names of the bona fide purchasers, amounts received by the Northern Pacific Railroad Company and the Northern Pacific Railway Company from said purchasers directly or through a subsidiary company and dates of deeds to said purchasers.

Defendant says the plaintiff is barred from bringing suit to vacate and annul patents to or to recover any of the lands referred to in said Exhibit W, for the reason that said patents issued to the Northern Pacific Railroad Company or to the Northern Pacific Railway Company more than six years prior to the institution of this suit.

Further answering, defendant alleges that the Northern Pacific Railroad Company and the Northern Pacific Railway Company have not received, including these lands and including all lands erroneously patented, the full measure of the grant made by the Act of July 2, 1864, and there are not now and were not at the time of the issuance of the patents referred to in said Exhibit W sufficient lands within the place limits and in the indemnity limits available for selection, to satisfy the full measure of the grant. Defendant says that the plaintiff is estopped to claim any of the proceeds from the said patented lands by the judgment and decree of the District Court of the United States for the Western District of Washington, Southern Division, in ten suits brought therein, wherein the United States was plaintiff and the Northern Pacific Railway Company and the Northern Pacific Railroad Company and others were defendants, and realleges all that part of paragraph XXII of this answer which relates to said suits and is set forth beginning at line 10, page 40, and ending with line 31, page 41.

or a further defense to subdivision XXVII, defendant says
if it should be held that defendant Northern Pacific Rail-
d Company or the Northern Pacific Railway Company was
entitled to receive said patented lands as indemnity for losses
o-called main line moiety sections, nevertheless said defendant
thern Pacific Railroad Company or the defendant Northern
ific Railway Company was at the time said patents issued
tled to receive said lands as indemnity for the loss of other
ds within place limits, and defendant in equity ought now
e permitted to substitute in support of said patented selections
er valid losses which never have been and never can be satisfied
erwise.

Defendant says the plaintiff is estopped to complain of any
he matters alleged in subdivision XXVII, because more than
twenty years have elapsed since the passage of the Act of
May 17, 1906, during all of which time the United States
and the Northern Pacific Railway Company have con-
ted their affairs with reference to the Act as being a valid
tract.

XXVIII

Defendant says that the facts set forth in subdivision XXVIII,
en by themselves or supported by other facts alleged in the
, are insufficient to constitute a valid cause of action in equity
o support any cause of action attempted to be set forth in the
of complaint.

Without waiving the defenses on points of law in this answer
forth:

Defendant admits that under the provisions of the Act of July
864, and the Joint Resolution of May 31, 1870, mineral lands
er than coal and iron lands were excepted from the grants;
in lieu of the mineral lands so excepted from the primary
its thereof the grantee was authorized to make selections of
ike quantity of unoccupied and unappropriated agricultural
ds, as alleged. Admits that Congress passed the Act of Feb-
ry 26, 1895 (28 Stat. 683), after the decision of the Supreme
rt in Barden v. Northern Pacific Railroad Company, 154 U. S.
, and that thereafter the Secretary of the Interior promulgated
es and regulations under said Act. Denies that the provisions
said Act of February 26, 1895, and the rules and regulations
mulgated thereunder by the Secretary of the Interior are cor-
tly summarized in the bill of complaint, and for a true state-
nt of the terms of said Act and of said rules and regulations
endant begs to refer to the Act and the rules and regulations
mselves. Alleges that by the Act of March 3, 1899, 30 Stat.
6, and the Act of June 3, 1900, 31 Stat. 615, Congress made

provision for continuing the work of classification by Mineral Land Commissioners. Admits that the Commissioners appointed under such Act of February 26, 1895, classified approximately 11,500,000 acres of land in the land districts referred to in said Act. Alleges that reports of said classifications in duplicate were filed monthly as the work progressed by each of the four Boards of Mineral Land Commissioners during a period of five years ending in May, 1901, in the local land offices and one duplicate of each report was transmitted to the Secretary of the Interior. Said reports were many in number and were wholly independent of each other. Each report related to specific lands and resulted each in a separate final decision by the Secretary of the Interior as to the parcels of land referred to therein. Upon the receipt of said reports the registers of the local land offices caused to be published, as required by said Act, in newspapers of general circulation in the counties in which the lands were located, and in one newspaper published at the capital city of each of the states, respectively, in which the lands were situated, notices of the classification of the lands as shown by said reports. Said classifications became effective only when approved by the Secretary of the Interior. Within the time provided for in said Act many protests against the classifications were filed and many hearings were ordered and held pursuant to said protest. Of the lands so classified by said Commissioners 3,568,378.27 acres in place limits and more than 1,000,000 acres in indemnity limits ultimately were held to be mineral lands by the Secretary of the Interior. A portion of the lands so approved by the Secretary as mineral lands had been classified by the Commissioners as non-mineral lands and a portion of them had been classified as mineral lands. Of the total acreage charged in the bill of complaint to have been classified by the Mineral Land Commissioners
499 under the Act of February 26, 1895, not all was so classified, but 183,497.50 acres were classified by the Commissioner of the General Land Office pursuant to the Act of Congress of June 25, 1910 (36 Stat. 739), and 30,502.13 acres are situated in the State of Washington and in the eastern portion of the State of Montana outside of the land districts named in the Act of February 26, 1895, and were classified by the Commissioner of the General Land Office independently of said last named Act. Alleges that this defendant and the Northern Pacific Railroad Company have selected approximately 1,330,762.65 acres in lieu of mineral losses within the place limits of the grant of July 2, 1864, all of which have been approved by the local land officers of the districts in which said lands are situated, and patents have been issued for a portion of said lands, but that

patents have not issued for a large portion of said lands so selected. Denies that said selections were all made in lieu of mineral lands classified as such under the Act of February 26, 1895, and alleges that said selections were made in lieu of mineral lands without reference to the mode by which they were adjudged to be mineral lands. Alleges that the Northern Pacific Railway Company claims the right to select 2,451,615.25 acres in lieu of mineral lands lost to its grant under the Act of July 2, 1864, because of their mineral character, but denies that all of said lands are claimed in lieu of mineral lands classified pursuant to the Act of February 26, 1895, and alleges that said claim covers all lands classified and approved as mineral under that Act and all lands otherwise classified as mineral lands, the loss of which has not been indemnified or for which lieu selections have not been patented or approved as herein stated. Denies that Exhibit X is a schedule of the lands classified as mineral by the Commissioners. Denies that Exhibit Y is a schedule of mineral indemnity selection lands which were patented to satisfy losses of land classified as mineral by said Commissioners.

Alleges that defendant has no knowledge or information sufficient to form a belief as to the relative values of the lands selected in lieu of mineral lands and of the total quantity of place lands classified as mineral.

Save as to those instances in which it has been specifically found after hearing that certain reports were erroneous, defendant denies that the reports of said Commissioners were false or untrue or erroneous. Denies that said classifications were made with special reference to the values of said lands and denies that said classifications were not made with special reference to their mineral or nonmineral character. Denies that any of the mineral indemnity selections based upon the loss of mineral lands were made in violation of any law or any regulation of the Secretary of the Interior or were to the injury of the United States. Admits that an employe of the defendant or the Northern Pacific Railroad Company was present in the field with each Board of Commissioners. Alleges that this fact was a matter of common knowledge and well known to officers of the plaintiff. Alleges that said employes were familiar with the country and were present for the purpose of aiding said Commissioners in locating section lines of surveys and to assist them in expediting their work of examination. Denies that agents or employes of the Northern Pacific Railway Company or the Northern Pacific Railroad Company suggested, recommended to, or importuned said Commissioners to classify the lands as mineral or nonmineral on the basis of values or otherwise without refer-

500 ence to the mineral or nonmineral character of said lands.

Denies that said Commissioners classified said lands in accordance with the wishes of agents or employes of the Northern Pacific Railway Company or the Northern Pacific Railroad Company. Denies that said agents or employes knew that the Secretary of the Interior would approve the classification reports and denies that the Northern Pacific Railway Company or the Northern Pacific Railroad Company was under any duty or obligation to give any advice to the Secretary of the Interior about the work of the Commissioners. Admits that at the times alleged in the bill of complaint A. A. Crane and John B. Goode served as members of the Commission for the classification of lands in the State of Idaho. Admits that in the year 1896 the Northern Pacific Railway Company entered into certain contracts for cutting timber and ties with Messrs. Crane and Goode as alleged in the complaint. Alleges that the plaintiff through the Commissioner of the General Land Office had specific and definite knowledge of those contracts more than thirty years ago. Denies that by said contracts the United States was deprived of the services of Messrs. Crane and Goode as free agents in the classification of lands and denies that similar contracts were made with any other of the Commissioners appointed to classify lands within the limits of the Northern Pacific grant. Admits that the Mineral Land Commissioners were given free transportation. Alleges that this free transportation was given at a time when free transportation was lawfully and commonly given to State and Federal officers by all railway companies. Denies that by the receipt of free transportation the Mineral Land Commissioners violated their oaths of office or ceased to be free agents of the United States. Denies that said Commissioners were given any benefits or favors by this defendant or the Northern Pacific Railroad Company, and denies that any of said Commissioners was under any obligation to this defendant or to the Northern Pacific Railroad Company.

Save as aforesaid, defendant denies each and every allegation in said subdivision XXVIII contained.

Defendant alleges that of the lands listed in Exhibit Y attached to the bill of complaint a portion has been sold to bona fide purchasers. Exhibit 11 attached hereto and made a part of this answer shows the descriptions of said lands, dates of patents, dates of said sales, names of the bona fide purchasers, amounts received by the Northern Pacific Railroad Company and the Northern Pacific Railway Company from said purchasers directly or through a subsidiary company, and dates of deeds to said purchasers.

Defendant says the plaintiff is barred from bringing suit to vacate and annul patents to or to recover any of the lands referred to in said Exhibit Y, for the reason that said patents issued to the Northern Pacific Railroad Company or to the Northern Pacific Railway Company more than six years prior to the institution of this suit.

Further answering, defendant alleges that the Northern Pacific Railroad Company and the Northern Pacific Railway Company have not received, including these lands and including all lands erroneously patented, the full measure of the grant made by the Act of July 2, 1864, and there are not now and were not at the time of the issuance of the patents referred to in said Exhibit Y sufficient lands within the place limits and in the indemnity limits available for selection, to satisfy the full measure of the grant.

501 The plaintiff is estopped to claim any of the proceeds from the said patented lands by the judgment and decree of the District Court of the United States for the Western District of Washington, Southern Division, in ten suits brought therein, wherein the United States was plaintiff and the Northern Pacific Railway Company and the Northern Pacific Railroad Company and others were defendants, and realleges all that part of paragraph XXII of this answer which relates to said suits and is set forth beginning at line 10, page 40, and ending with line 31, page 41.

Defendant says the plaintiff is estopped to complain of any of the matters alleged in said subdivision XXVIII, for the reason that nearly thirty years have elapsed since the classification by Commissioners called for by said Act of February 26, 1895, was completed and said matters have been known by the plaintiff for nearly thirty years. The United States has not at any time sought and does not now seek a reclassification of said lands, but has withdrawn for National Forests 2,894,823.43 acres of land in the place limits of the grant made by the Act of July 2, 1864, which were classified as mineral under the Act of February 26, 1895, has sold timber from said lands and has received from such sales more than a million dollars. The United States has disposed of 65,155.47 acres of said lands so classified as mineral through mineral entries, and has disposed of 455,040.03 acres of said lands so classified as mineral through nonmineral entries under the Public Land Laws. As early as 1899 the Secretary of the Interior was advised that one of the Boards had classified lands without personally going upon the lands. Prior to 1907 the Northern Pacific Railway Company protested to the Secretary of the Interior that more than 250,000 acres of land in Idaho had

been classified by the Commissioners without going upon the lands classified. In January 1908 the then Secretary of the Interior gave consideration to a formal charge that said mineral classification as a whole was fraudulent and directed the Chief of the Field Service of the General Land Office to look into the charge and advise him. On February 1, 1908, said Chief of the Field Service made his report to the Secretary, and again on March 12, 1908, said Chief of the Field Service made another and further report to the Commissioner of the General Land Office. In these reports the Secretary of the Interior and the Commissioner of the General Land Office were advised of the matters now complained of in said subdivision XXVIII.

On March 11, 1908, there was filed in the Department of the Interior a report of a committee of the Montana Mining Association dated February 17, 1908, appointed to investigate the mineral classifications, and by this report the Secretary of the Interior and the Commissioner of the General Land Office were advised of those matters of which complaint is now made.

On March 4, 1909, the Legislature of the State of Montana adopted a memorial to Congress, wherein it was alleged that the mineral classification was unscientific, worthless, and made without full knowledge, and was to the detriment of the Government and the public and asked that a reclassification be made in the interest of the miners and prospectors of the State of Montana. This memorial was printed in the Congressional Record and was referred to the Committee of Public Lands of the Senate.

Nevertheless, as hereinbefore set forth, the plaintiff
502 herein continued to deal with this defendant and to issue patents to lands based upon said approved classification and defendant has made numerous sales to bona fide purchasers of lands so patented.

XXIX

Defendant says that the facts set forth in subdivision XXIX, taken by themselves or supported by other facts alleged in the bill, are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint.

Answering subdivision XXIX but without waiving any of the defenses on points of law in the answer set forth:

Defendant admits that a treaty was entered into September 17, 1851, between the United States and certain tribes of Indians named therein, but denies that by said treaty any lands of the United States were set apart and reserved by the United States as reservations for said tribes of Indians or any of them. Admits

that by various appropriation acts Congress appropriated money for said Indian tribes pursuant to the provisions of said treaty. Admits that under date of October 17, 1855, a treaty was entered into between the United States and the Blackfoot Nation of Indians, but denies that by said treaty any lands were set apart as a reservation for said Indians. Alleges that whatever may be the true meaning and effect of said treaties as between the United States and the Indian tribes, the lands covered thereby, patented to or claimed by the Northern Pacific Railroad Company or this defendant, at all times prior to the definite location of defendant's railroad through or opposite to said lands, were public lands of the United States within the disposing power of Congress, and the character of the Indian title thereto was such as the United States in the Act of July 2, 1864, agreed to extinguish as rapidly as may be consistent with public policy and the welfare of said Indians.

Admits that a treaty was entered into on May 7, 1868, between the United States and the Crow Tribe of Indians and alleges that a reservation for said Indians was first created and set apart by that treaty. Admits that during the years 1880, 1881, and 1882 there were filed with the Commissioner of the General Land Office maps of definite location covering portions of the proposed railroad from Bismarck, North Dakota, to Lake Pend d'Oreille, Idaho. Alleges that said maps were filed by the Northern Pacific Railroad Company. Admits that a railroad was constructed substantially upon the line of definite location and that primary and indemnity limits were established by the Secretary of the Interior opposite the line of definite location and lands within those limits were withdrawn from public entry. Admits that the railroad as constructed crossed certain of the lands referred to in the treaties of September 17, 1851, and October 17, 1855. Admits that the officers of the United States administered the land grant of the Northern Pacific Railroad Company upon the theory that lands referred to in said treaties were not lands that had been reserved for the Indians, but were lands that were subject to acquisition by the Northern Pacific Railroad Company under the provisions of said Act of July 2, 1864. Denies that Exhibits Z and AA are a schedule of the lands as alleged in subdivision XXIX of the bill. Admits that on the issuance of patents the Northern Pacific Railroad Company, and subsequently the Northern Pacific Railway Company, assumed complete ownership of the lands listed on Exhibits
503 Z and AA, for which patents were issued. Denies that any of the sums of money received from sales or received

through leases or otherwise from said lands, rightfully belongs to the plaintiff.

Save as aforesaid, defendant denies each and every allegation in said subdivision XXIX contained.

The plaintiff is estopped to question or complain of said method of administering the land grants to the Northern Pacific Railroad Company, for the reason that the construction of said treaties has been uniform and continuous during a period of nearly 50 years. Alleges that said method of administration and said construction of the treaties have been uniform not only with respect to the grant to the Northern Pacific Railroad Company but also with respect to the grant to the Union Pacific Railroad Company under the Acts of July 1, 1862 (12 Stat. 489), and July 2, 1864 (13 Stat. 356), and with respect to all other railroad land grants for roads lying within the territories described in said treaties.

Alleges that a portion of the lands listed in Exhibits Z and AA were sold to bona fide purchasers. Exhibit 12 hereto attached and made a part of this answer shows the descriptions of said lands, dates of patents, dates of said sales, names of bona fide purchasers, amounts received by the Northern Pacific Railroad Company and the Northern Pacific Railway Company from said purchasers directly or through a subsidiary company, and dates of deeds to said purchasers.

Defendant says the plaintiff is barred from bringing suit to vacate and annul patents to or to recover any of the lands referred to in said Exhibits Z and AA, for the reason that patents to the lands listed therein, which were patented to the Northern Pacific Railroad Company or to the Northern Pacific Railway Company issued more than six years prior to the institution of this suit.

Further answering, defendant alleges that the Northern Pacific Railroad Company and the Northern Pacific Railway Company have not received, including these lands and including all lands erroneously patented, the full measure of the grant made by the Act of July 2, 1864, and alleges that there are not now and were not at the time of the issuance of the patents referred to in said Exhibits Z and AA sufficient lands within the place limits and in the indemnity limits available for selection to satisfy the full measure of the grant. Defendant says the plaintiff is estopped to claim any of the proceeds from the said patented lands by the judgment and decree of the District Court of the United States for the Western District of Washington, Southern Division, in ten suits brought therein, wherein the United States was plaintiff and the Northern Pacific Railway Company and the Northern

Pacific Railroad Company and others were defendants, and realleges all that part of Paragraph XXII of this answer which relates to said suits and is set forth beginning at line 10, page 40, and ending with line 31, page 41.

XXIX-A

Defendant says that the facts set forth in subdivision XXIX-A taken by themselves or supported by other facts alleged in the bill, are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint.

Answering subdivision XXIX-A, but without waiving any of the defenses on points of law in this answer set forth:

504 Defendant admits that the lands described in Exhibit EE were patented to the Northern Pacific Railroad Company or the Northern Pacific Railway Company. Plaintiff is estopped to question any of the facts upon which the patents rest. Plaintiff is barred from bringing suit to vacate and annul said patents to or to recover any of said lands for the reason that said patents were issued more than six years prior to the institution of this suit.

Alleges that of the lands listed in said Exhibit EE a portion has been sold to bona fide purchasers. Alleges that Exhibit 13 hereto attached contains a correct description of the lands so sold, dates of patents, dates of said sales, names of bona fide purchasers, amounts received by the Northern Pacific Railroad Company and the Northern Pacific Railway Company and the Northwestern Improvement Company from said purchasers, and dates of deeds to said purchasers. Admits that defendant Northern Pacific Railroad Company and defendant Northern Pacific Railway Company assumed complete ownership of said lands. Denies that any of the sums of money received from sales or received through leases, or otherwise, rightfully belongs to the plaintiff.

Defendant alleges that the Northern Pacific Railroad Company and the Northern Pacific Railway Company have not received, including these lands, and including all lands erroneously patented, the full measure of the grant made by the Act of July 2, 1864, and there are not now and were not at the time of the issuance of the patents referred to in said subdivision sufficient lands within the place limits and in the indemnity limits available for selection, to satisfy the full measure of the grant. Defendant says that the plaintiff is estopped to claim any of the proceeds from said patented lands by the judgment and decree of the District Court of the United States for the Western

District of Washington, Southern Division, in ten suits brought therein, wherein the United States was plaintiff and the Northern Pacific Railway Company and the Northern Pacific Railroad Company and others were defendants. Defendant realleges that portion of paragraph XXII of this answer which relates to said suits and is set forth beginning at line 10, page 40, and ending with line 31, page 41.

In answer to plaintiff's allegations in regard to the ascertainment of deficiency in the acreage of the land grant defendant realleges paragraph XX of this answer.

Defendant denies that the lands set forth in tabulation E of Exhibit EE were patented in error or mistake and denies that said lands were withdrawn for and reserved as a part of the Yakima Indian Reservation.

On the 5th day of March, 1907, the plaintiff herein filed in the Circuit Court of the United States for the Eastern District of Washington a bill of complaint signed by Charles J. Bonaparte, Attorney General, entitled, The United States of America, Complainant, vs. Northern Pacific Railway Company et al., Defendants, wherein it was sought to cancel patents for lands issued to the Northern Pacific Railroad Company and the Northern Pacific Railway Company within the Yakima Indian Reservation upon the alleged erroneous and mistaken belief that said lands were included within the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, and were outside of said reservation. On the 25th day of September 1909 a decree was entered in said suit cancelling some of said
505 patents and holding that the United States was the owner of and entitled to possession of the land covered by said patents subject to the rights of the Yakima Indians. There were excluded from the decree certain lands included in the bill of complaint; namely, lots 1, 2, 3, and 4 of Sec. 19, T. 7 N., R. 13 E. The case was subsequently appealed to the Circuit Court of Appeals for the Ninth Circuit and there affirmed. An appeal was taken from the decree of the Circuit Court of Appeals to the Supreme Court of the United States, and that court by decision, dated February 24, 1913, reported in Vol. 227 U. S., page 355, affirmed said decree. In its decision the Supreme Court held:

"There is no question made of the title of the railroad and railway companies or of their respective vendees other than as the lands fall within or without the reservation. If they were within the boundaries of the reservation they were lands of the Indians; otherwise, public lands of the United States and passed to the companies, respectively, under the act of Congress and the patents issued in pursuance thereof (p. 356).

"The question then is, What were the boundaries of the reservation, or—to use the present tense as the more convenient—what are the boundaries of the reservation? (p. 356).

"The controversy in the case, therefore, turns upon which of the surveys, Schwartz' or Barnard's, correctly marks the boundaries of the reservation. The difference in the surveys amounts to 293,837 acres. The Circuit Court accepted the Barnard survey and entered a decree cancelling the patents. The decree was affirmed by the Circuit Court of Appeals. 191 Fed. Rep. 947 (p. 358).

"The special controversy in the case is the location of the western boundary of the reservation (p. 359).

"There is evidence which may be adduced in corroboration of the testimony of the respective witnesses, but we have referred to enough to indicate the character and relative strength of that which makes for or against the contentions of the parties, and, considerately weighing it, we think it establishes the correctness of the Barnard survey" (p. 365).

All of the lands set forth and described in tabulation E of Exhibit EE lie to the west of the southwest line of the Barnard survey and outside of the Yakima Indian reservation as defined by said decision.

Defendant alleges that if it should be held that defendant Northern Pacific Railroad Company or defendant Northern Pacific Railway Company was not entitled to receive the lands listed in tabulation C of Exhibit EE as primary lands, nevertheless said defendant Northern Pacific Railroad Company or the defendant Northern Pacific Railway Company was at the time said patents issued entitled to receive said lands as indemnity for the loss of mineral lands within place limits, and defendant in equity ought now to be permitted to specify in support of said patents valid losses which never have been and never can be satisfied otherwise.

XXX

Answering subdivision XXX, defendant says that subdivisions XXII to XXIX–A, inclusive, of the bill, which are referred to in said subdivision XXX, are insufficient to constitute a valid cause of action in equity for an adjustment or an accounting, and says that the plaintiff is entitled to such relief only as may be justified by the cause of action attempted to be set forth separately in each of said subdivisions under established rules of law and equity appropriate to the case attempted to be made in each of said subdivisions. Defendant denies that the Interior Department has made any errors or mistakes in computing acreages of lands that the Northern Pacific Railroad Company or the Northern

Pacific Railway Company was entitled to receive, save as in this answer stated.

506 XXXI

Defendant says that the facts set forth in subdivision XXXI, taken by themselves or supported by other facts alleged in the bill, are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint.

Answering subdivision XXXI but without waiving any of the defenses on points of law in this answer set forth:

Defendant denies that said subdivision correctly summarizes that part of the Act of July 2, 1864, referred to, and for a correct statement of the terms of the Act, defendant begs to refer to the Act itself. Admits that the Northern Pacific Railroad Company entered into a contract dated April 23, 1870, which contract remained in full force and effect until May 1, 1880, with the North Western Telegraph Company and the Western Union Telegraph Company, and admits that Exhibit BB attached to the bill of complaint is a true copy of said contract. Admits that under the terms of said contract a telegraph line was constructed from Thompson Junction, Minnesota, to Bismarck, North Dakota, and from Kalama, Washington, to Tacoma, Washington, along the right of way of the Northern Pacific Railroad Company. Alleges that the Northern Pacific Railroad Company bore one-half of the expense of constructing said telegraph lines and thereafter a one-half interest in said telegraph lines was owned by the Northern Pacific Railroad Company. Denies that the Northern Pacific Railroad Company attempted by means of said contract to relieve itself of any of the obligations imposed upon it by the Act of July 2, 1864, and denies that the Northern Pacific Railroad Company thereby failed to perform any of said obligations. Alleges that prior to 1875 the lines of telegraph referred to in subdivision XXXI were examined by Commissioners and approved and accepted by the President of the United States as provided in Section 4 of the Act of July 2, 1864.

Save as aforesaid, defendant denies all of the allegations of subdivision XXXI.

Defendant says the plaintiff is estopped to question or complain of any of the matters set forth in subdivision XXXI, for the reason that all of the facts relative to the construction, maintenance and operation of said lines of telegraph have been known to the plaintiff for more than fifty years; that no complaint has ever been made by the United States because of them, and the Northern Pacific Railroad Company and the Northern Pacific Railway Company have dealt with the United States and with

the public in reliance upon the acceptances and course of conduct herein alleged.

XXXII

Defendant says that the facts set forth in subdivision XXXII, taken by themselves or supported by other facts alleged in the bill, are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint.

Answering subdivision XXXII but without waiving any of the defenses on points of law in this answer set forth:

Defendant admits that from time to time there were filed with the Commissioner of the General Land Office certain maps of general route. Admits that the Secretary of the Interior made withdrawals of odd numbered sections of public lands
507 along the lines established by certain of said maps of general route. Alleges that at the same time and pursuant to the requirements of the Act of July 2, 1864, the Secretary of the Interior increased the price of even numbered sections within the place limits of the grant from $1.25 per acre to $2.50 per acre. Admits that thereafter maps of definite location were filed by the Northern Pacific Railroad Company with the Commissioner of the General Land Office and that withdrawals of odd numbered sections of public lands were made along the line so definitely located. Admits that the Supreme Court of the United States decided the case of Nelson v. Northern Pacific Railway Company, 188 U. S. 108, on January 26, 1903. Denies that as a consequence of withdrawals on general route the Northern Pacific Railroad Company or the Northern Pacific Railway Company received any benefits, lands, or values that they were not entitled to receive under the Act of July 2, 1864, and denies that the United States was in any way injured by said withdrawals.

Admits that upon the filing of certain maps of definite location the Secretary of the Interior established primary and indemnity limits and withdrew odd numbered sections in the indemnity limits. Alleges that such indemnity withdrawals were revoked by the Secretary of the Interior on August 15, 1887. Admits that the Supreme Court of the United States decided the case of Hewitt v. Schultz, 180 U. S. 139, on January 7, 1901. Denies that by reason of withdrawals within indemnity limits the Northern Pacific Railroad Company or the Northern Pacific Railway Company received any benefits, lands or values to which they were not entitled and denies that the United States was injured by said withdrawals.

Save as aforesaid, defendant denies each and every allegation in said subdivision XXXII contained.

Defendant says that the United States is estopped to question or complain of any of the matters set forth in subdivision XXXII, for the reason that all of the facts relative to withdrawal of lands on filing maps of general route and withdrawal of indemnity lands on filing maps of definite location have been known to the plaintiff for nearly fifty years and no complaint has ever been made by the United States because of these withdrawals and the Northern Pacific Railroad Company and the Northern Pacific Railway Company have dealt with the United States and with the public in reliance upon the course of conduct of the United States in making no claim of injury and in asserting no rights because of said withdrawals. Neither the Northern Pacific Railroad Company nor the Northern Pacific Railway Company had any duty to perform with respect to said withdrawals and neither of said companies in any way participated in the making of said withdrawals.

XXXIII

Defendant says that the facts seth forth in subdivision XXXIII, taken by themselves or supoprted by other facts alleged in the bill, are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint.

Answering subdivision XXXIII but without waiving any of the defenses on points of law in this answer set forth:

508 Defendant admits that in said subdivision a portion of the Act of Congress of July 15, 1870 (16 Stat. 305), is correctly quoted. Denies that prior to the decision of the Supreme Court of the United States in Northern Pacific Railroad Company v. Traill County, 115 U. S. 600, decided on December 7, 1885, the Northern Pacific Railroad Company failed or refused to pay to the United States costs incurred by the United States in surveying lands within the land grant. Alleges that the first demand for payment was made by the Commissioner of the General Land Office on March 29, 1882, and the sums of money so demanded were paid on September 21, 1882, and the Northern Pacific Railroad Company made payment of other survey fees on demand prior to December 7, 1885.

Save as aforesaid, defendant denies each and every allegation in said subdivision XXXIII contained.

Defendant says the plaintiff is estopped to question or complain of any of the matters set forth in subdivision XXXIII, for the reason that all of the facts alleged in said subdivision have been known to the plaintiff for more than forty years, and no complaint has ever been made by the United States because of them, and

the Northern Pacific Railroad Company and the Northern Pacific Railway Company have dealt with the United States and with the public in reliance upon the course of conduct of the United States in making no claim of injury and in asserting no rights because of the facts alleged in subdivision XXXIII.

XXXIV

Answering subdivision XXXIV, defendant denies that the Northern Pacific Railroad Company or the Northern Pacific Railway Company was guilty of laches in the selection of indemnity lands, and denies that there were at any time available for selection 450,000 acres of land or any other amount which the Northern Pacific Railroad Company or the Northern Pacific Railway Company should have selected but failed to select. Defendant alleges that the losses to the Northern Pacific Railroad Company and to the Northern Pacific Railway Company in place limits amounted to many millions of acres, and this fact was at all times well known to the plaintiff. Nevertheless, the plaintiff failed to make available for selection lands within the indemnity limits required to satisfy said losses, and the Secretary of the Interior by an arbitrary regulation prevented selection of indemnity lands until after survey. The United States, through a long period of years, has neglected to make surveys of lands within place and indemnity limits, and some of said lands have not yet been surveyed. Alleges that the delay by the plaintiff in making surveys resulted in the loss to the Northern Pacific Railroad Company and this defendant of large acreages of lands in indemnity limits that were acquired by third persons while unsurveyed, and also defeated the right conferred upon the Northern Pacific Railroad Company and this defendant by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, to make selections from lands within the indemnity limits of the grants.

XXXV

Defendant says that the facts set forth in subdivision XXXV, taken by themselves or supported by other facts alleged in the bill, are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint.

509 Without waiving any of the defenses on points of law in this answer set forth, defendant denies all of the allegations contained in said subdivision.

Defendant says the plaintiff is estopped to complain of any of the matters alleged in subdivision XXXV, because more than

thirty years have elapsed since the passage of the Act of March 2, 1899, during all of which time the United States and the Northern Pacific Railway Company have conducted their affairs with reference to the Act as being a valid law. Alleges that said Act constitutes a contract within the protection of the Fifth Amendment to the Constitution of the United States, and alleges that this defendant has fully performed its part of said contract.

XXXVI

Defendant says that the facts set forth in subdivision XXXVI, taken by themselves or supported by other facts alleged in the bill, are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint.

Answering subdivision XXXVI but without waiving any of the defenses on points of law in this answer set forth:

Defendant denies the allegation in the first paragraph of subdivision XXXVI and alleges the fact to be that prior to the decision of the Supreme Court of the United States in 256 U. S. 51, the position of the Department of the Interior was that the grantee in railroad land grants had no rights to any indemnity lands prior to a selection thereof.

Admits that under the provisions of the Act of July 25, 1866, Congress made a grant of lands to the Oregon & California Railroad Company to aid in the construction of a railroad, and that thereafter primary and indemnity land grant limits were established along the line of said railroad. Admits that the Northern Pacific Railway Company under the provisions of the Act of July 1, 1898, and the Act of March 2, 1899, selected certain odd-numbered sections within the indemnity limits of the grant to the Oregon & California Railroad Company prior to the survey thereof. Alleges that the Northern Pacific Railway Company at the time of said selection had no knowledge of the location of the land-grant limits of the Oregon & California Railroad Company and had no knowledge as to whether or not there was a deficiency in the grant to the Oregon & California Railroad Company; that at said time no deficiency in said grant had been found by the Secretary of the Interior; that the lands so selected appeared on the records of the local land office to be public lands of the United States; that said selections were made in accordance with the regulations of the Secretary of the Interior and no protest was made against them; that the Oregon & California Railroad has never made any claim against this defendant to the lands so selected. Admits that a schedule of said lands is attached to the

bill of complaint and marked Exhibit CC. Denies that patents to said lands were issued without authority of law and denies that said patents were wrongfully issued or void. Admits that the Northern Pacific Railway Company has sold said lands to third persons and has used the receipts therefrom for its own purposes.

Save as aforesaid, defendant denies each and every allegation in subdivision XXXVI contained.

510 Alleges that said lands were sold to bona fide purchasers. Exhibit 14 attached hereto and made a part of this answer shows the descriptions of said lands, dates of patents, dates of said sales, names of the bona fide purchasers, amounts received by the Northern Pacific Railway Company from said purchasers and dates of deeds to said purchasers.

Defendant says the plaintiff is barred from bringing suit to vacate and annul patents to or to recover any of the lands referred to in said Exhibit CC, for the reason that said patents issued to the Northern Pacific Railway Company more than six years prior to the institution of this suit.

XXXVII

Answering subdivision XXXVII, defendant denies that the provisions of the Act of June 25, 1929, attempted to be summarized in said subdivision are as alleged, and for a correct Statement of the terms of said Act defendent begs to refer to the Act itself. Admits that in Exhibits O, DD and Q attached to the bill of complaint there is shown all of the lands within the indemnity limits of the land grants made to the Northern Pacific Railroad Company under the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, which on June 5, 1924, were embraced within National Forests or other Government reservations except 3,300 acres in Gallatin National Forest, referred to in paragraph XXI hereof and shown on defendant's Exhibit II. Alleges that on the date of every withdrawal of lands shown on said Exhibits O, DD, and Q, and defendant's Exhibit 11 there was a deficiency in the grants to the Northern Pacific Railroad Company, and on each of said dates of withdrawal there were insufficient lands within the indemnity limits of each of said grants available for selection to satisfy the losses in the place limits of each of said grants, respectively, for which it was entitled to indemnity.

Alleges that on June 5, 1924, this defendant was the equitable owner of all the lands shown in Exhibits O, P, DD, Q, and defendant's Exhibit 3, but most of said lands are unsurveyed and defendant by regulations and decisions of the Secretary of the

Interior has been denied the right to file indemnity selection lists describing them, or any other lands in National Forests or other government reservations, and the lands shown in Exhibits O and DD, the withdrawn lands shown in Exhibit Q, and the lands shown in defendant's Exhibit 3, are the lands expropriated by the Act of June 25, 1929, for which this defendant is entitled to compensation.

Admits that the United States has expended money in the administration of the lands described in said Exhibits O and DD and the withdrawn lands listed in Exhibit Q, and the lands described in defendant's Exhibit 3. States that the amount so expended is unknown to this defendant. Alleges that the expenditures so made by the United States were made with full notice and knowledge of this defendant's claim to said lands. Admits that defendant has never been in possession of any of said lands.

XXXVIII

Defendant says that the facts set forth in subdivision XXXVIII, taken by themselves or supported by other facts alleged in the bill, are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint.

511 Answering subdivision XXXVIII, defendant admits that said subdivision states with substantial accuracy the provisions of Section 2 of the Act of June 25, 1929. Defendant says that this section of said Act is unconstitutional and void, for the reason that it is in contravention of the Fifth Amendment of the Constitution of the United States. Defendant says that Congress is without authority to forfeit indemnity selection rights to satisfy losses of place lands opposite any portion of constructed road which has been accepted by the President of the United States.

If any right to forfeit unsatisfied indemnity selection rights ever existed, that right was waived by the United States nearly fifty years ago by the following proceedings, Acts of Congress, and course of conduct:

In the year 1882 a bill which had been introduced in Congress to forfeit the Northern Pacific grants because the road was not finished in time was referred to the House Committee on Judiciary. The majority of that Committee made a report which reads in part as follows:

"As has already been stated, 1,180 miles of the road have been completed; 600 or less remain. Work is going on at both interior termini and on the tunnels in the heart of Montana. It appears that 150 miles were approved by President Hayes in 1880, and 325 miles by President Arthur last year. The company asserts

that by September, 1883, they will finish the road; that they are progressing as fast as can possibly be done. No testimony or suggestion to the contrary has been made by anyone. Your committee do not see how the transfer of the lands to another company could hasten the completion of the road, nor would it be regarded as advisable for the Government to complete the road by its own direct action. Congress would hardly regard either course as needful and necessary to insure the speedy completion of the road.

"We can conceive of no legislation which would hasten the completion of the road, and therefore recommend none."

On the 6th day of June, 1882, the report of the Committee was submitted to the House of Representatives and a motion was made that the report be laid upon the table. This motion was adopted. Defendant realleges all that part of paragraph II-A of this answer beginning at line 1, page 3, and ending with line 35, page 8, and that part of paragraph II-A beginning with line 5, page 2, and ending with line 17, page 2.

Defendant alleges that the railroad was constructed with all reasonable dispatch, and that the completion of construction by July 4, 1879, was rendered impossible by the hostilities of Indian tribes and by the failure of the United States to extinguish the Indian titles as provided in the Act of July 2, 1864.

XXXIX

Answering subdivision XXXIX, defendant admits that the Northwestern Improvement Company was incorporated under the laws of the State of New Jersey in the year 1897, and not the year 1896 as alleged. Admits that ever since its incorporation all of its capital stock has been owned by the Northern Pacific Railway Company. Admits that from time to time this defendant has conveyed to the Northwestern Improvement Company tracts of odd numbered sections of land situated within the primary and indemnity limits of the grants made by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870. Admits that the Northwestern Improvement Company has received sums of money from said lands by reason of sales, leases, and royalties.

512 Save as aforesaid, defendant denies each and every allegation in said subdivision XXXIX contained.

XL

Defendant says that the facts set forth in subdivision XL, taken by themselves or supported by other facts alleged in the

bill, are insufficient to constitute a valid cause of action in equity or to support any cause of action attempted to be set forth in the bill of complaint.

XLI

Answering subdivision XLI, defendant admits that the facts pertaining to moneys and lands referred to in the subdivisions of the bill of complaint enumerated in subdivision XLI are within its knowledge, but denies that such facts or any of them are material to plaintiff's cause or necessary for plaintiff's relief. Denies that the facts in the possession of this defendant supporting other allegations of the bill of complaint are material to plaintiff's cause or necessary to plaintiff's relief.

Wherefore defendant prays that the court find and decree that the grants made to the Northern Pacific Railroad Company by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, were and are deficient to the extent and at the times alleged in this answer, and that the court determine the compensation due to the Northern Pacific Railway Company for the lands expropriated by the United States by the Act of June 25, 1929, and enter its decree in favor of this defendant for the sum so found, together with interest thereon from the 25th day of June, 1929. Defendant further prays that the court dismiss the bill of complaint as to all other matters therein set forth.

GRAFTON MASON,
D. R. FROST,
D. F. LYONS,
E. J. CANNON,
Solicitors for Defendant
Northern Pacific Railway Company.

532 In United States District Court

[Title omitted.]

[File endorsement omitted.]

Supplemental answer of defendant, City Bank Farmers Trust Company

Filed July 22, 1931

Now comes the defendant, City Bank Farmers Trust Company, appearing herein by Taylor, Blanc, Capron, and Marsh and E. J. Cannon, its solicitors, and, pursuant to the stipulation dated June 4, 1931, between the parties to the above-

entitled cause, which stipulation was filed in and approved by this court on June 25, 1931, files this its supplemental answer to the bill of complaint herein as amended and supplemented by said stipulation, and, on information and belief, alleges:

I. Answering the paragraph contained in said stipulation to be inserted immediately following line 23 on page 49 of said bill and to be marked lines "23–1" to "23–97", inclusive, as
533 to the truth of the allegation with regard to the content and purport of the Acts of July 2, 1864, and March 4, 1907, and the Joint Resolution of May 31, 1870, this defendant refers to said Acts and Joint Resolution for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes, and effect thereof. Except as to the truth of the allegations with regard to the content and purport of said Acts and Joint Resolution, this defendant has no knowledge as to the truth of any allegation contained in said paragraph.

II. Answering the subdivision contained in said stipulation to be inserted immediately following page 84 of said bill and to be marked subdivision "XXIX–A", as to the truth of the allegations with regard to the content and purport of (1) the agreements and/or treaties dated September 10, 1876 (ratified by Congress on February 28, 1877), September 26, 1876 (ratified by Congress on February 28, 1877), July 16, 1855, and June 9, 1855, between the United States and certain Indian tribes, (2) the executive orders of the President of the United States, dated September 2, 1864, and February 11, 1873, (3) the Acts of July 2, 1864, March 2, 1889, and December 21, 1904, and (4) Joint Resolution of May 31, 1870, this defendant refers to said agreements and/or treaties and executive orders (which agreements and/or treaties and executive orders, or duly certified copies thereof, this defendant calls upon the plaintiff to produce upon the trial of this cause) and to said Acts and Joint Resolution for a complete and accurate statement of the recitals, provisions, terms, conditions, purposes, and effect thereof. Except as
534 to the truth of the allegations with regard to the content and purport of said agreements and/or treaties, executive orders, Acts, and Joint Resolution, this defendant has no knowledge as to the truth of any allegation contained in said paragraph.

III. This defendant, by leave of court first had and obtained as aforesaid, amends paragraph 47 of its original answer by inserting in line 33 on page 15 of said original answer immediately following the numeral "XLI," the following: "(including the paragraph of said bill of complaint added by the stipulation dated June 4, 1931, and numbered XXIX–A)."

IV. This defendant, by leave of court first had and obt
aforesaid, amends the prayer numbered "(1)" of its orig
swer by inserting in line 35 on page 28, immediately fo
the numeral "XLI," the following: "(including the pa
of said bill of complaint added by the stipulation dated
1931, and numbered XXIX-A)."

Except as amended and/or supplemented as aforesaid,
fendant reiterates and adopts all the allegations and pr
its original answer filed herein.

Dated July 18, 1931.

TAYLOR, BLANC, CAPRON & MARSH,
43 Exchange Place, New York,
E. J. CANNON,
Old National Bank Building, Spokane, Washi
Solicitors for Defendan
City Bank Farmers Trust Com

MANSFIELD FERRY,
EDWARD E. WATTS, JR.,
Of Counsel.
E. J. CANNON,
Of Counsel.

535 In United States District Court

Supplemental answer of defendant Bankers Trust Co

Filed July 24, 1931

The defendant Bankers Trust Company makes its
mental Answer to the complaint in the above-entitl
pursuant to the stipulation dated June 4, 1931, between
ties thereto and an order approving said stipulation fil
25, 1931, as follows:

I. Answering the paragraph contained in said stipul
be inserted immediately following line 23 on page 49 of
of Complaint, to be marked "Lines 23-1 to 23-91 inclusi
defendant admits that Northern Pacific Railway Comp
tends that a deficiency exists in said land grant, and in
ance thereof has filed and recorded with the officers of
terior Department certain claims for additional lands, t
to which is asserted under the Act of July 2, 1864, and t
Resolution of May 31, 1870. This defendant refers to th
July 2, 1864, and the Joint Resolution of May 31, 1870,
provisions and effect thereof and denies each and every
tion with respect thereto. This defendant is without kn

as to the other allegations contained in said new paragraph contained in said new lines 23–1 to 23–91 inclusive.

II. Answering subdivision to be marked Subdivision "XXIX–A," to be shown immediately following page 84 of said Bill of Complaint, in so far as the allegations in said subdivision refer to Acts, Resolutions, or Treaties or Agreements of the United States, or Executive Orders of the President of the United States, this defendant refers thereto for the provisions and effect thereof, and denies each and every allegation in respect thereto. This defendant is without knowledge as to the other allegations contained in said Subdivision XXIX–A.

III. This defendant reiterates and adopts for its Supplemental Answer all of the separate and complete defenses contained in its original Answer filed herein, and all of the denials, allegations, and prayers made therein.

Dated July 22, 1931.

WHITE & CASE,
14 Wall St., New York City.
E. J. CANNON,
Spokane, Washington.
Solicitors for defendant Bankers Trust Company.

[File endorsement omitted.]

536 In United States District Court

Supplemental answer of defendant Bankers Trust Company

Filed July 28, 1931

The defendant Bankers Trust Company makes its Supplemental Answer to the complaint in the above entitled suit, pursuant to the stipulation dated June 4, 1931, between the parties thereto and an order approving said stipulation filed June 25, 1931, as follows:

I. Answering the paragraph contained in said stipulation to be inserted immediately following line 23 on page 49 of the Bill of Complaint, to be marked "Lines 23–1 to 23–91, inclusive", this defendant admits that Northern Pacific Railway Company contends that a deficiency exists in said land grant, and in furtherance thereof has filed and recorded with the officers of the Interior Department certain claims for additional lands, the right to which is asserted under the Act of July 2, 1864, and the Joint Resolution of May 31, 1870. This defendant refers to the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, for the provisions and effect thereof, and denies each and every allegation with respect thereto. This defendant is without knowledge

as to the other allegations contained in said new paragraph contained in said new lines 23-1 to 23-91, inclusive.

II. Answering subdivision to be marked Subdivision "XXIX-A", to be shown immediately following page 84 of said Bill of Complaint, insofar as the allegations in said subdivision refer to Acts, Resolutions, or Treaties or Agreements of the United States, or Executive Orders of the President of the United States, this defendant refers thereto for the provisions and effect thereof, and denies each and every allegation in respect thereto. This defendant is without knowledge as to the other allegations contained in said Subdivision XXIX-A.

III. This defendant reiterates and adopts for its Supplemental Answer all of the separate and complete defenses contained in its original Answer filed herein, and all of the denials, allegations, and prayers made therein.

Dated July 22, 1931.

WHITE & CASE,
14 Wall St., New York City,
E. J. CANNON,
Spokane, Washington,
Solicitors for defendant Bankers Trust Company.

[File endorsement omitted.]

541 In United States District Court

Disclaimer of Northern Pacific Railroad Company

Filed Jan. 18, 1932

Defendant Northern Pacific Railroad Company, a corporation, organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365), says that it does not claim or pretend to have any right, title, or interest in the subject matter of this suit as set forth in the original bill of complaint as amended, or any part thereof, and this defendant disclaims any right, title, or interest in said subject matter and every part thereof.

Wherefore this defendant prays that the original bill of complaint as amended be dismissed as to it.

GRAFTON MASON,
E. J. CANNON,
D. F. LYONS,
D. R. FROST,
Solicitors for Defendant,
Northern Pacific Railroad Company, a corporation.

[File endorsement omitted.]

542 In United States District Court,

Motion to strike disclaimer of defendant Northern Pacific Railroad Company, a corporation organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365)

Filed Feb. 13, 1932.

Comes now the above-named plaintiff and respectfully moves the Court to strike and remove from the files in the above-entitled cause the disclaimer filed therein by the defendant Northern Pacific Railroad Company, a corporation organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365).

This motion is made upon the following grounds:

(1) The said cause is brought under the provisions of the Act of Congress of June 25, 1929 (46 Stat. 41), and involves the interpretation, liabilities, performance, and requirements of a legislative contract entered into by the plaintiff and said defendant, as set forth in plaintiff's bill of complaint as amended, and the plaintiff is entitled to a full and complete answer by the said defendant to all the charges and allegations made in its bill of complaint herein as amended relative to said defendant with respect to said contract, to the end that the rights of the plaintiff against the said defendant Northern Pacific Railroad Company, a corporation organized and existing under the provisions of the Act of July 2, 1864, and/or each and all of the other defendants herein may be fully ascertained and determined by this honorable Court.

(2) The right of the plaintiff to a discovery by said defendant of facts and documents material to plaintiff's cause, as shown by the books and records of said defendant.

(3) The granting to the plaintiff of the relief prayed for by it in said cause will necessitate the continued presence of the said defendant as a party defendant in said cause until the final
543 determination by the courts having jurisdiction thereof of the rights and liabilities of all of the parties thereto.

NUGENT DODDS,
Assistant Attorney General.
ROY C. FOX,
United States Attorney for the Eastern District of Washington, Northern Division.
D. F. McGOWAN,
Special Assistant to the Attorney General.
E. E. DANLY,
Special Assistant to the Attorney General.

[File endorsement omitted.]

544 In United States District Court

Answer of defendant Northern Pacific Railroad Company, a corporation

Filed May 9, 1932

Now comes the defendant Northern Pacific Railroad Company, a corporation, and for its answer to the bill of complaint says:

It admits that it is a federal corporation, organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365), and has an office in the City of New York. Denies that it is engaged in business.

Defendant abides by, adopts, and makes a part of this answer the amended and supplemental answer filed herein by defendant Northern Pacific Railway Company.

GRAFTON MASON,
D. R. FROST,
D. F. LYONS,
E. J. CANNON,
Solicitors for defendant Northern Pacific Railroad Company.

548 In United States District Court

[Title omitted.]

Motion for hearing on points of law

Filed July 18, 1931

Defendants Northern Pacific Railway Company and Northwestern Improvement Company request the Court to call up and dispose of defenses in point of law arising upon the face of the bill and specified in their amended and supplemental answers, and defenses of laches, res adjudicata, equitable estoppel and the statute of limitations made in their amended and supplemental answers before final hearing of this suit. The defenses in point of law appearing on the face of the bill are specified in paragraphs I, XIX, XXII to XXXIII, inclusive, XXXV, XXXVI, XXXVIII and XL, of the amended and supplemental answer of defendant Northern Pacific Railway Company, and the defenses of laches, res adjudicata, equitable estoppel, and the statute of limitations are set forth in paragraphs II, XXII to XXIX-A, inclusive, XXXI, XXXII, XXXIII, XXXV, XXXVI and XXXVIII of said amended and supplemental answer.

Defendant requests the Court to permit the parties to introduce evidence at the hearing relevant to the defenses of laches, res adjudicata, equitable estoppel, and the statute of limitations.

GRAFTON MASON,
D. R. FROST,
D. F. LYONS,
E. J. CANNON,
Solicitors for Defendants Northern Pacific Railway Company and Northwestern Improvement Company.

[File endorsement omitted.]

549 In United States District Court

[Title omitted.]

Motion of defendant Bankers Trust Company for hearing before trial of affirmative defenses

Filed Aug. 24, 1931

The defendant Bankers Trust Company requests the Court to call up and dispose of, pursuant to Equity Rule No. 29, before the final hearing of the above entitled suit, each and every of the defenses made in the answer and supplemental answer of defendant Bankers Trust Company and set forth in the separate and complete defenses contained in this defendant's answer as supplemented, such defenses being those set forth in paragraphs 23 to 44 inclusive of said answer as supplemented. This defendant also requests the Court to permit it and all other parties to the above entitled suit to introduce evidence at the hearing as to such of said defenses as to which evidence may be taken pursuant to said rule or otherwise.

Dated August 14, 1931.

WHITE & CASE,
14 Wall Street, New York, N. Y.
E. J. CANNON,
Spokane, Washington,
Solicitors for defendant, Bankers Trust Company.

[File endorsement omitted.]

550 In United States District Court

Notice of motion of defendant, City Bank Farmers Trust Company, for separate hearing before trial on certain defenses set up in answer

Please take notice that on Monday, the 15th day of February 1932, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, at the United States District Court for the Eastern District of Washington, Northern Division, at the Federal building, City of Spokane, State of Washington, the attached motion will be presented.

Dated February 4, 1932.

TAYLOR, BLANC, CAPRON & MARSH,
Office and Post Office Address,
No. 43 Exchange Place, New York, N. Y.
E. J. CANNON,
Spokane, Washington,
Solicitors for defendant,
City Bank Farmers Trust Company.

Service accepted by receipt of a true copy this 4th day of February 1932.

E. J. FARLEY,
Asst. U. S. Attorney.

In United States District Court

Motion of defendant, City Bank Farmers Trust Company, for separate hearing before trial on certain defenses set up in answer

Filed Feb. 4, 1932

Now comes the defendant, City Bank Farmers Trust Company, and shows to the court that in its separate answer filed herein to the bill of complaint, it pleaded in paragraphs 43 and 44 of said separate answer defenses in point of law arising upon the face of the bill, which might prior to the adoption of Federal Equity Rule 29, have been made by demurrer or plea; that said points of law each go to the whole or a material part of the
551 cause or causes of action stated in the bill; and that it pleaded in paragraphs 45, 46, and 48 to 73, inclusive, of said separate answer and in paragraph 47 of said separate answer as amended by its supplemental answer filed herein to said bill of complaint, defenses which prior to the adoption of said rule were presentable by pleas in bar or abatement.

Wherefore, defendant prays the court (1) to call up and dispose of said points of law (pleaded in paragraphs 43 and 44 of said separate answer) before final hearing; (2) to hear separately and dispose of said defenses formerly presentable by pleas in bar or abatement (pleaded in paragraphs 45, 46, and 48 to 73, inclusive, of said separate answer and in paragraph 47 of said separate answer as amended by said supplemental answer) before the trial of the principal case; (3) to fix a date for such preliminary hearings; and (4) to dismiss this suit as to this defendant with costs expended and incurred herein.

Dated February 4, 1932.

TAYLOR, BLANC, CAPRON & MARSH,
Office and Post Office Address,
No. 43 Exchange Place, New York, N. Y.
E. J. CANNON,
Spokane, Washington,
Solicitors for defendant,
City Bank Farmers Trust Company.

MANSFIELD FERRY,
EDWARD E. WATTS, Jr.,
Of Counsel.

E. J. CANNON,
Of Counsel.

[File endorsement omitted.]

552 In United States District Court

Motion to call up and dispose of defenses, etc.

Filed May 9, 1932

Defendant Northern Pacific Railroad Company requests the Court to call up and dispose of defenses in point of law arising upon the face of the bill and specified in the amended and supplemental answer of the Northern Pacific Railway Company, which this defendant has adopted and made a part of its answer, and the defenses of laches, res adjudicata, equitable estoppel, and the statute of limitations, made in said amended and supplemental answer, before the final hearing of this suit. The defenses in point of law appearing on the fact of the bill are specified in paragraphs I, XIX, XXII, to XXXIII, inclusive, XXXV, XXXVI, XXXVIII, and XL, of the amended and supplemental answer of defendant Northern Pacific Railway Company, and the defenses of laches, res adjudicata, equitable estoppel, and the statute of limitations are set forth in paragraphs II, XXII to XXIX-A, inclusive, XXXI, XXXII, XXXIII,

XXXV, XXXVI, and XXXVIII of said amended and supplemental answer.

Defendant requests the Court to permit the parties to introduce evidence at the hearing relevant to the defenses of laches, res adjudicata, equitable estoppel, and the statute of limitations.

Defendant Northern Pacific Railroad Company further requests the Court to refer this motion to Frank H. Graves, Esq., appointed special master herein by order dated February 25, 1932, to hear and dispose of matters as set forth in said order.

Defendant further petitions the Court to make the same reference to said Frank H. Graves, Esq., special master, with reference to final hearing as is made in said order.

NORTHERN PACIFIC RAILROAD COMPANY,
By GRAFTON MASON,
D. R. FROST,
D. F. LYONS,
E. J. CANNON,
Its Solicitors.

[File endorsement omitted.]

553 In United States District Court

Petition for appointment of master

Filed Feb. 24, 1932

Defendants Northern Pacific Railway Company, Northwestern Improvement Company, Bankers Trust Company, and City Bank Farmers Trust Company petition the court to refer all pending motions and petitions in this cause and all defenses in point of law arising upon the face of the bill and specified in the amended and supplemental answers on file herein, and the defenses of laches, res adjudicata, equitable estoppel, bona fide purchaser, and the statute of limitations, and any other defenses formerly presentable by pleas in bar or abatement, specified in said amended and supplemental answers, to a special master to take evidence relevant to said last-named defenses, to hear argument on said motions, petitions, and defenses in point of law arising upon the face of the bill and the other defenses specified herein and to report to the court his findings of fact and conclusions of law and recommendations for orders and decrees on all of said matters, together with such parts of the evidence as any party may request in writing, said findings, conclusions, and recommendations to be subject to review by the Court.

These defendants further petition the court to authorize and direct said special master, after his findings and conclusions have

been reported to the court and any exceptions thereto have been heard and determined, and orders or decrees on said motions, petitions, and defenses have been entered by the court, to proceed with the final hearing and take evidence therein and make full and complete findings of fact and conclusions of law and report the same to the court, said findings and conclusions to be subject to review by the court.

As reasons for the appointment of a master, these de-
554 fendants show that the issues in this cause are unusually complicated and will require the taking of a great mass of testimony and examination of many documents as will appear more fully from an inspection of the records and files in this cause, which are referred to and made a part of this application.

Northern Pacific Railway Company and Northwestern Improvement Company, by Grafton Mason, D. R. Frost, D. F. Lyons, E. J. Cannon, Their Solicitors; Bankers Trust Company, by White & Case, E. J. Cannon, Its Solicitors; City Bank Farmers Trust Company, by Taylor, Blanc, Capron & Marsh, E. J. Cannon, Its Solicitors.

[File endorsement omitted.]

555 In United States District Court

Order appointing special master

Filed Feb. 25, 1932.

This cause being at issue upon the motions of defendants Northern Pacific Railway Company, Northwestern Improvement Company, Bankers Trust Company and City Bank Farmers Trust Company to call up and dispose of defenses in point of law arising upon the face of the bill and specified in the amended and supplemental answers of said defendants, and the defenses of laches, res adjudicata, equitable estoppel, bona fide purchaser and the statute of limitations, and any other defenses formerly presentable by pleas in bar or abatement, made in said amended and supplemental answers, before final hearing of this suit, and

This cause also being at issue upon the motion of said defendants for the appointment of a special master in chancery, and the parties herein having appeared by their solicitors, and the court having heard the parties, and it appearing to the court that the requests to call up and dispose of defenses before final hearing of this suit should be granted and that this is a proper cause for the appointment of a special master,

It is hereby ordered that Frank H. Graves, Esq., having expressed a willingness to accept such appointment, and the court having full faith and confidence in his ability, integrity, and qualifications, be and he is hereby appointed special master in chancery and he is hereby authorized and directed to hear (1) all pending motions and petitions in this cause, and (2) all defenses in point of law arising upon the face of the bill and specified in the amended and supplemental answers on file herein, and (3) the defenses of laches, res adjudicata, equitable estoppel, bona fide purchaser, the statute of limitations, and any other defenses formerly presentable by pleas in bar or abatement, and specified in the amended and supplemental answers, to take evidence relevant to all said last enumerated defenses and any necessary and proper evidence relative to the above mentioned motions, to hear argument on said motions, petitions, and defenses in point of law arising upon the face of the bill and the other defenses specified herein, and to report to the court his
556 findings of fact and conclusions of law and recommendations for orders and decrees on all of said matters, together with such parts of the evidence as any party may request in writing, said findings, conclusions, and recommendations to be subject to review by the court.

It is further ordered that said special master, after his findings and conclusions and recommendations have been reported to the court and any exceptions thereto have been heard and determined, and decrees or orders on said motions and defenses have been entered by the court, proceed with the final hearing and take the evidence herein and make full and complete findings of fact and conclusions of law and report the same to the court, said findings and conclusions to be subject to review by the court. Said master shall have all the power that may be conferred by this court and as provided by the laws of the United States.

The compensation to be allowed to said master and the expenses incident to this reference shall in the first instance be charged upon and borne equally by the plaintiff and defendant Northern Pacific Railway Company.

It is further ordered That the plaintiff shall pay the costs, including stenographer's fees, of taking its testimony and shall furnish one copy thereof to the defendants without costs; that defendants shall pay like costs of taking their testimony and shall furnish to plaintiff one copy thereof without cost.

Done this 25th day of February 1932.

J. STANLEY WEBSTER,
United States District Judge.

[File endorsement omitted.]

557 In United States District Court

Order of reference

Filed May 24, 1932

This cause being at issue upon the motion of defendant Northern Pacific Railroad Company to call up and dispose of defenses in point of law arising on the face of the bill and specified in the amended and supplemental answer of the Northern Pacific Railway Company, which has been adopted and made a part of the answer of defendant Northern Pacific Railroad Company, and the defenses of laches, res adjudicata, equitable estoppel, and the statute of limitations, and

This cause also being at issue upon the motion of said defendant for a reference to the special master in chancery, Frank H. Graves, Esq., appointed by order of this Court on February 25, 1932, and the parties herein having appeared by their solicitors, and the Court having heard the parties,

It is hereby ordered that the motion of defendant Northeren Pacific Railroad Company to call up and dispose of defenses in point of law arising upon the face of the bill and other specified defenses be referred to Frank H. Graves, Esq., to take evidence relevant to the specified defenses, to hear argument on said motion and defenses, and to report to the Court his findings of fact and conclusions of law and recommendations for orders and decrees on all of said matters, together with such parts of the evidence as any party may request in writing, said findings, conclusions, and recommendations to be subject to review by the Court.

It is further ordered that said special master, after his findings and conclusions and recommendations have been reported to the Court and any exceptions thereto have been heard
558 and determined, and decrees or orders on said motion and defenses have been entered by the Court, shall proceed with the final hearing and take the evidence herein and make full and complete findings of fact and conclusions of law and report the same to the Court, said findings and conclusions to be subject to review by the Court. Said master shall have all the power that may be conferred by this Court and as provided by the laws of the United States.

Done this 24th day of May 1932.

J. STANLEY WEBSTER,
United States District Judge.

[File endorsement omitted.]

559 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Report of special master

Filed May 31, 1933

SIR: I have the honor herewith to transmit my report under Order of reference, February 25, 1932.

The sketch of the history of the Northern Pacific road is prefixed so that your Honor may have before you a consecutive and connected account of the matters brought under examination by the bill, the demurrers and the several pleas. To that has been added a brief statement of the settlement and the development of the Northwest, 1870–1890. In these two decades the road was builded; and the attitude of Congress and the executive departments of the Government toward the railroad company can be correctly interpreted only with reference to contemporaneous conditions in the country traversed by the railroad.

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I have endeavored to avoid, as far as possible, analysis or review of the many authorities cited to me. I wish to say, however, that, with the exception of certain Land Office decisions and some opinions of Attorneys General, I have examined every case cited and a few not cited as well. Many cases could be easily put aside. Others required much study and consideration.

Notwithstanding the greatest care to verify statements of fact I realize that it is altogether likely some errors may have crept in. It is thought, however, in the main, in this respect, the report is accurate.

Respectfully submitted.

F. H. GRAVES, *Special Master.*

Dated:

To Honorable J. STANLEY WEBSTER,
Judge of the District Court of the United States
for the Eastern District of Washington.

561

I

HISTORY OF THE NORTHERN PACIFIC ENTERPRISE.

By the Act of July 2, 1864, Richard D. Rice and other persons named were erected into a body corporate by the name and style of the Northern Pacific Railroad Company with perpetual succession. The usual corporate powers to sue and have a com-

mon seal, and all other powers necessary to carry into effect the purposes of the Act were conferred. The capital stock was fixed at 1,000,000 shares of $100 per share par value. The persons named were appointed commissioners, directed to organize as such, to open books for subscriptions of the capital stock with a down payment of 10 per centum, and to receipt therefor. All people of the United States were given the right to subscribe until the stock had all been taken, and the company was prohibited from placing a mortgage or construction bonds or a lien in any other way upon the road except by consent of Congress. So soon as 20,000 shares had been in good faith subscribed, and $10 per share actually paid in, the commissioners were directed to call a meeting of the subscribers who were to elect thirteen directors, and thereafter the stockholders were to constitute the body corporate created by the Act.

A right of way 200 feet in width on each side of the road bed was granted out of the Public Domain, and power of Eminent Domain, to be exercised when necessary, conferred. The character of construction of the road and telegraph line was prescribed and the duty imposed upon the company to make running connections with any other railroad on fair and equitable terms.

It was enacted that the railroad and every part of it
562 should be a postal route, and military road, subject to use for postal, military, naval, and all other Government service upon such charges for such Governmental transportation as Congress might impose.

The acceptance of the Act was to be signified in writing under the corporate seal of the Company within two years after its passage, and not afterward, and served upon the President of the United States. Unless within the same time bona fide subscriptions to the stock for $2,000,000 were obtained, and 10 per centum paid, the Act was declared null and void.

To aid in the work a grant was made of every alternate section of public land designated by odd numbers, to the quantity of twenty alternate sections per mile on each side of the line adopted by the Company through territories, and ten such sections through States. The aggregate of the odd-numbered sections within the defined limits, generally termed "place limits," was, therefore, the correct measure of the grant, with these two exceptions only: (a) when the moiety rule was applied to a portion of the grant, and (b) when the route of the road and that of another with a prior land grant should be found to be upon the same general line. The former exception is in question in this case in the "Wallula Overlap", and the latter in the alleged

paralleling by the line of this road with that of the Portage, Winnebago & Superior Railroad Company to which a prior land grant had been made. Lands falling within these two exceptions were deducted from the grant, and no indemnity selections allowed therefor. If at the time the line should be definitely fixed, and the plat thereof filed with the Commissioner
563 of the General Land Office, any part of the granted sections had been sold, or otherwise reserved by the Government, other odd-numbered sections might be selected in lieu thereof under the direction of the Secretary of the Interior, not more than ten miles beyond the place limits. Mineral lands were, likewise, excepted from the grant, but, in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections nearest the line of the road, and within fifty miles thereof, might be selected in like manner.

The grant was in presenti, but upon the conditions precedent that the company should be organized by subscription and payment as and within the time prescribed, and the Act be accepted as and within the time prescribed: upon the conditions subsequent that within two years work be commenced upon the road, not less than 50 miles per year after the second year completed, and that the whole road be constructed, equipped, and furnished by July 4, 1876.

Thereafter the company claimed to have organized as required, and filed its acceptance with the President.

It was the theory of its promoters that the road could be financed by popular stock subscription. Doubtless this theory was responsible for Section 10 of the Act, prohibiting a bond issue and providing expressly for popular stock subscriptions. It soon became apparent, however, that the enterprise could not thus be financed. No money had come in and the work could not, therefore, be commenced within the time limited by the Act. By Joint Resolution, approved May 7, 1866, the time for beginning and completing the road was extended for two years. The time was again extended by Joint Resolution of July 1st, 1868, for commencing work to July 2d, 1868, and for completing it to July 4, 1877. It appears that on June 11, 1879, the Secretary of the Interior ruled that the final date for completion
564 was July 4, 1879. Counsel on both sides seem to agree to that date and I have, therefore, accepted it as correct.

In May, 1866, Mr. Edwin F. Johnson was appointed Chief Engineer and directed to make a preliminary survey. He presented his first report in November 1867, accompanied by a map delineating a tentative route. This map did not at all places correspond with the general route finally located. It did, how-

ever, show the line to Puget Sound via the valley of the Yakima River. Various surveys were thereafter made from time to time, and the route finally adopted was gradually come to. The Company was without funds; the enterprise seemed hopeless. No meeting of the stockholders to elect directors, as required by the By-Laws, was held in 1867, nor in either of the two following years.

It had by this time become evident that the road must be built, if at all, with the proceeds of a loan placed upon the money market. As the first step to that end Congress passed the Joint Resolution of March 1st, 1869, giving its consent to the issuance of bonds by the Railroad, to be secured by mortgage upon its road and telegraph line. In the meantime, however, the services of Jay Cooke & Company were sought to float the bond issue. Before considering the proposition this firm sent out engineers and others, in whom it had confidence, to make an examination of the route of the road, and of the character of the country to be traversed. Upon reports of these parties the firm undertook to act as agents for the bond issue. On May 30, 1869, a provisional agreement, supplemented by another of January 1st, 1870, was made between that firm and the company. These contracts provided for a bond issue of $100,000,000, bearing interest at the rate of 7.3%. The railroad was to be credited by the bank-
565 ing firm with 88¢ on the dollar for bonds sold and was to receive $200 of the stock of the railroad company for every $1,000 of bonds sold. The 12 proprietary interests, under what is called in this case the "Original Interests Agreement", were increased to 24, and twelve of them assigned to Cooke & Company. The Original Interests Agreement referred to was a contract between President Smith of the company and certain others, of date January 10, 1867, dividing the enterprise into twelve shares, each of the value of $8,500; each of the twelve shares to be entitled to one director in the company. Various other provisions of the Jay Cooke agreement are not necessary to be here recited.

The Joint Resolution of March 1st, 1869, did not appear to Jay Cooke & Company to be sufficient authority for the contemplated issue, and, thereupon, Congress passed the Joint Resolution of May 31st, 1870. By its terms the railroad was authorized to issue its bonds to aid in the construction and equipment of its road, and to secure same by mortgage upon its property, and rights of property, of all kinds and description, real, personal, and mixed, including its franchise as a corporation. It also required any mortgage given to be filed and recorded in the office of the Secretary of the Interior. It provided that if at

any time the mortgage thus placed should be enforced by foreclosure, or other legal proceedings, either at its maturity or for any default of the company under its terms, the lands covered by it should be sold at public sale at places within the States and Territories in which they were situate, after not less than sixty days' previous notice, and in single sections or subdivisions thereof, to the highest and best bidder. In addition the
566 Resolution authorized the company to locate and construct with the privileges, grants, and duties provided under the original Act of incorporation, its main line to some point on Puget Sound via the Columbia River, and to construct its branch from some convenient point on its main line, crossing the Cascade Mountains to Puget Sound. For the additional construction between Portland and Puget Sound a land grant was given identical with the original grant, and an indemnity limit of the same width on each side fixed, with the same provisions for indemnity selections as in the original grant. The Resolution also established what is known as the second indemnity limits. The resolution contained other provisions which are difficult to construe, and as later on in this report it will be necessary to examine these in detail, I will omit statement of them at this time.

In Volume VII of his History of the United States, at page 103, Mr. Rhodes says that Jay Cooke's offer of the Northern Pacific bonds was advertised everywhere, especially in the religeous newspapers. Their high character and previous operations as Government agents seemed to assure that whatever they undertook would be successful. Many experienced investors took these bonds, but the feature of the floatation was its popularity among clergymen, school teachers, and others with small savings attracted by the high rate of interest.

Mr. Smalley in his History of the Northern Pacific Railroad, pages 172, 173, says these bonds for a time became the favourite investment with all classes of people. Savings of thousands of mechanics, farmers, and traders went into these securities, and the money for the subscriptions came in from all parts of the country. Over 8,000 names were placed upon the books of the company. There was scarcely a state not repre-
567 sented by numerous subscribers. He adds that in after years, when the land grant of the company was assailed in Congress, this wide diffusion of the bonds proved a great element of strength. Bond holders becoming stockholders after the reorganization of 1875 brought their influence to bear upon their representative in Congress to protect the company's interests, and scores of Congressmen were surprised to learn by letter after letter from constituents that the Northern Pacific had influential friends in their own districts.

With the money thus raised work was begun on February 15, 1870, at Thompson Junction, now Carlton, Minnesota, and the track westward through Minnesota completed to the Northern Pacific Junction at Red River, now Moorhead, December 30, 1871. Between October 1871 and the spring of 1873, track was laid to the Missouri River at Bismarck. During this same period the Puget Sound Division from Kalama to New Tacoma was completed.

Then came the panic of 1873. It began with a sharp financial panic in May of that year on the Vienna Bourse. Mr. Rhodes, in volume VII of his History of the United States, at page 105, says it is not surprising that businessmen did not for'see what was coming. Prosperity was written all over the face of things. Railroad earnings were good. Manufacturers were busy, workmen in demand; street and shops were crowded and new buildings were being erected. Everybody seemed to be making money, and nobody suspected for a moment he was living in a fool's paradise. The supply of breadstuffs in Europe was reported short; in this country crops were abundant. It was even feared the capacity of the railroads and ocean steamships would be insufficient to carry the freight. Cornelius Vanderbilt was
568 paying $120 per ton for steel rails for his four-track railroad. This description seems to us, in 1933, strikingly familiar. Mr. Rhodes further remarks that such reasoning looked plausible enough in 1873, but that the financial history of our country shows it is difficult for bankers and traders to see when the danger point has been reached. They know too well that the "tide taken at the flood leads on to fortune," and so the optimists were at the helm, not knowing the tide had turned.

On September 18, 1873, Jay Cooke & Company failed. There was a general rush to sell stocks, and a general falling of all values. The next day the banking house of Fisk and Hatch failed. Eighteen other firms, unable to stand by their contracts, were announced in the Exchange. Saturday morning the Union Trust Company and the National Trust Company suspended and the National Bank of the Commonwealth followed. The Exchange was closed at once until further notice. On September 21st Henry Clews & Company suspended, and the next day the banking house of Howes and Macy. Gradually the Wall Street panic passed over, but the commercial crisis continued. By November 1st a number of railroads had defaulted in the payment of interest. There was a general closing of cotton and iron mills and other manufacturing establishments. Failures outside of Wall Street began. One failure led to another. Suspicion and dread hung over the whole business community.

The failure of Jay Cooke & Company brought down with it the Northern Pacific Railroad Company. Its sale of bonds ceased entirely. Mr. Smalley says that the days of confidence and enthusiasm seemed gone forever. Funds, even in small amounts, for the immediate necessities of the company could only be borrowed by pledging two, or even three, dollars of bonds
569 for one of cash. Many of the friends of the enterprise turned against it in its adversity. The newspapers ridiculed it and said it was a "wild scheme to build a railroad from Nowhere through No-Man's Land to No Place." Jay Cooke was denounced in some quarters as a hot-headed visionary, in others as a cold-blooded schemer. Construction work on the road ceased. Numerous attacks upon the project were brought forward in Congress. Efforts to procure an extension of time were made and in two successive sessions bills for that purpose were favorably reported by Committee, but did not get on the Calendar.

It became necessary, if the enterprise was to proceed, to reorganize. There were about 11,000 bondholders scattered from Maine to Texas. The common stock issued was principally that issued under the Original Interests Agreement, at the time of the contract with Jay Cooke & Company. The road had reached no objective spot. No additional funds in the company's then condition could be raised. All parties in interest finally agreed upon a plan of reorganization in 1875, and the peoperty was foreclosed on suit by the bondholders, and this plan made a part of the decree. Later on I shall consider this reorganization somewhat fully—suffice it now to say that by it the capital stock was divided into $51,000,000 of preferred stock, and $49,000,000 of common stock. The bondholders were to receive $30,000,000 of preferred stock for their $30,000,000 of bonds. To this was added the delinquent interest so that each holder of $1,000 of bonds received $1,400 of preferred stock. This absorbed practically $42,000,000 of the preferred stock, and the remaining $9,000,000 was to remain in the Treasury for the general purposes of the Company. The common-stock holders were to exchange their previous common stock, share for share, but without voting rights
570 for several years, and no dividends until in each year the preferred stock had received 8%. The remainder of the stock, after deducting the preferred and common stock issued to the stockholders, was distributed to the owners of the proprietary interests.

The Company, as thus reorganized, was in possession of about 575 miles of railroad free from encumbrance, with an attaching domain of something like 10,000,000 acres of land, and the right to earn 30,000,000 more by the completion of the road. All in-

debtedness was extinguished and the company was in position to proc*ede* with construction.

Work was resumed in the Spring of 1879. By June 1880 the road had reached a point 100 miles west of Bismarck; by September it had reached Medora, and by July the Yellowstone River. In October 1879 construction began at Ainsworth and was carried Eastward from that point. Track-laying from East and West met on August 22, 1883, and the ceremony of driving the Golden Spike occurred on the 8th day of September of that year. Construction East of Thompson Junction to the Eastern terminal was completed in the years 1882 and 1883. After September 1883 the road was in operation from St. Paul to Wallula and via O. R. & N. down the Columbia River to Portland, and from Portland to Tacoma. The branch from Wallula to Puget Sound, via the Yakima valley, was completed in 1887, and immediately put into operation as the main line. No map of definite location was filed for the road authorized down the Columbia River to Portland, and that part of the line was not built.

As 25-mile sections of the road were completed, commissioners appointed by the President examined and reported upon it and it was accepted, and the land grant earned thereby was certified for patent, where surveyed. In a communication to the President on October 4, 1884, Mr. Teller, Secretary of the Interior,
571 recommended that no farther patents issue for lands in these completed sections until further order, which recommendation the President approved. Again, on December 8, 1884, as to another section of the road the Secretary renewed the suggestion and it was approved by the President. The suggestion was again renewed on January 17, 1885, and again approved by the President; and again on February 6, 1885. On March 2d, 1885, Secretary Teller recommended to the President that orders restricting issuance of patents theretofore made be withdrawn, and that recommendation was approved. For the period covered by the above orders patents did not issue. After the withdrawal of these orders patents appertaining to accepted twenty-five-mile sections of road issued in due course.

The question of forfeiting the grant because of failure to complete on time was first brought up in Congress in 1880. A committee considered the question, heard arguments from officials of the road, and from others, but no action was taken. At the first session of Congress in 1882 a bill was introduced to forfeit the grant and was referred to the House Committee on Judiciary. The majority of that committee reported against any action; the minority reported in favor of forfeiture. The majority report, carrying with it the minority report, was laid upon the table and

no further action was taken on the question. This action of Congress was reported to the stockholders, and the railroad proceeded with its construction as above outlined.

From the time of the completion of the road its trains were operated with regularity and dispatch. The Government mail, troops, and supplies were carried at the rates fixed by Congress under authority of the Act. Settlers and their supplies coming from all portions of the country were carried into
572 the territories of Montana, Idaho, and Washington, and the country was fast settling up. The road appeared to be prosperous; its business was good; its rates remunerative.

The panic of 1893 is described by Mr. Rhodes, beginning at page 304 of Volume VIII, of his history. In February the Philadelphia and Reading Railroad went into the hands of a receiver. In May the National Cordage Company went to the wall. The stock market collapsed. During May and June National banks and a great number of State and private banks suspended payment, while mercantile failures were enormous. The country was in the throes of a financial panic, which was especially disastrous in the West, manifesting itself, for one thing, in runs on banks. These banks rapidly withdrew their deposits in New York. During that year 158 National banks failed; of these, 153 were in the West and South. In New York the banks generally issued clearing-house certificates in settlement of balances. Within two years nearly one-fourth of the total railway capitalization passed through bankruptcy courts. Banks in Chicago, Indianapolis, Louisville, and Milwaukee closed their doors. In addition to the National banks, 177 private banks, 47 savings banks, 13 loan and trust companies, and 16 mortgage companies failed. In the East the panic was less severe than that of 1873, but no such wreck had fallen upon the West since it had become a factor in the financial world.

The Northern Pacific Railroad Company was unable to meet its payments and receivers were appointed in 1893. After various proceedings the entire property of the road was sold to the Northern Pacific Railway Company, which thereupon came into possession of the road and its land grant, and has operated the road ever since. Patents for lands under the grant
573 have been issued to it from time to time, and every branch of the Government has recognized it as the successor of the railroad company. I will have occasion later on to discuss this question fully, and refer to it now only that the narrative may be complete.

The Supreme Court handed down its decision in the Forest Reserve case, April 11, 1921. It appears that, pursuant to suggestions in this case, the Interior Department undertook an ad-

justment of the Northern Pacific grant, and that the preliminary figures indicated that the acreage might be deficient with the consequence that several million acres of National Forest and other lands withdrawn for Governmental purposes might pass under the grant. December 19, 1923, the Commissioner of the General Land Office transmitted to the Forestry, Department of Agriculture, a copy of this tentative adjustment. On January 12, 1924, the Forester, by letter of that date, advised the Commissioner at some length of his views in the matter. By joint communication of date February 12, 1924, addressed to Mr. Sinnott, Chairman of the Public Lands Committee of the House, the Secretary of Agriculture, and Secretary of the Interior called his attention to the question and suggested that Congress by joint resolution raise a committee to investigate the whole subject. A similar letter had been addressed to Mr. Lenroot, Chairman of the Committee on Public Lands of the Senate. The Secretary of Agriculture had, likewise, communicated with the President about the matter, and under date of February 23, 1924, in a communication addressed to Mr. Sinnott, the President expressed his concurrence in the recommendations of the Secretaries, and suggested that Congress proceed as requested; the result
574 being that, by joint resolution of the two Houses, approved June 5, 1924, the Secretary of the Interior was directed to withhold for the present his approval of the adjustment of the land grant, and a committee was raised with the customary powers conferred and appropriation made to investigate the whole question of the land grant. The joint committee met March 18, 1925, and commenced its work, ultimately reporting to Congress with the proposed bill which, after some changes, became the Act of June 25, 1929, upon which this suit is brought.

575

II

THE NORTHWEST, 1870–1890

In United States vs. Northern Pacific Railway Company, 256 U. S. 51 (Forest Reserve case), it is said that "The purpose of the granting Act and Resolution was to bring about the construction and operation of a line of railroad extending from Lake Superior to Puget Sound and Portland through what then consisted of great stretches of homeless prairies, trackless forests, and unexplored mountains, and thus to facilitate the development of that region, promote commerce, and establish a convenient highway for the transportation of mails, troops, munitions, and public stores to and from the Pacific Coast, with all the resultant advantages to the Government and to the public."

Mr. Smalley, in his history of the Northern Pacific Railroad, gives a summary of the conditions of the Northwest in the summer of 1870. I think it is sufficiently correct, and will somewhat abbreviate it.

The Lake Superior and Mississippi Railroad had just been built from St. Paul to the town of Duluth. It was at a point on this road, Thompson Junction as it was then called, now Carlton, that work on the Northern Pacific was commenced. Westward from that point there was not a town, village, or hamlet on or near the line marked out for the road for a distance of over a thousand miles. Between the head of the lake and the mining camps among the Rocky Mountains in Montana no abodes of civilized man existed, save two or three military posts and Indian agencies, and a few isolated trading stations. Lumbermen had not yet penetrated into the forests of northern Minnesota, except for a few miles back of Lake Superior.
576 The western part of Minnesota had but lately been the home of the warlike Sioux, and was quite destitute of population. Between the Red River and the Missouri the country was still occupied by the Sissiton and Wahpeton bands of Sioux Indians, whose title was not finally extinguished until 1872. Beyond the Missouri, and as far west as the Belt range of the Rocky Mountains, the whole vast region of valleys, plains, and mountains was in the undisputed occupancy of the savage. It was the buffalo hunting ground. Near the falls of the Missouri a little town had grown up at Fort Benton, to which steamboats ran in seasons of high water, bringing goods for the Indian reservations and for transport by wagon to the distant mines of Montana. In the high valleys and gulches of the Rocky Mountains there were a few scattered mining settlements, isolated from the rest of the world. They had been given a territorial organization by Congress, and had developed some prosperous little towns, such as Helena, Bozeman, Deer Lodge, Virginia City, and Bannock. Their supplies were hauled from the head of steamboat navigation on the Missouri more than two hundred miles away. These settlements dated from 1862, when prospectors came into the mountains in search of gold. These were joined by parties of adventurous emigrants who travelled by ox-teams from western Missouri—deserters from the contending armies, or people confused by the din of the Civil War, not wishing to risk their lives on either side. Detachments of gold hunters came from California. It was, says Mr. Smalley, "a strange, wild aggregation of reckless, rascally, daring, and enterprising and industrious elements; but with the wonderful self-organizing faculty of the Anglo-Saxon race order was soon evolved from chaos."

577 West of the Rocky Mountains, on the headwaters of the streams running into the Columbia, were other settlements of miners in the territory of Idaho, similar in character and history to those in Montana. The northern group of these settlements had its supply depot at Lewiston, at the confluence of the Snake and Clearwater rivers. From the Rocky Mountains to the Cascades spread out an extensive stretch of high table lands, thickly covered with rank nutritious grasses and of great grain producing capacity. This region was wholly destitute of permanent settlement in 1870, except where the town of Walla Walla stood, and where farmers had then begun the cultivation of wheat. There were a few military posts and a few Protestant and Jessuit Missions on the Upper Columbia and Spokane Rivers and on Lake Coeur d'Alene. They could hardly be called settlements for their business was exclusively with the Indian tribes. Beyond the Cascade Mountains, in Washington Territory, was a community, sparsely grouped around the waters of Puget Sound and largely engaged in cutting and exporting the magnificent timber growing upon its shores. There was a settlement in Washington on the Columbia River at Vancouver. By the census of 1870 there were only 14,181 souls dwelling in the territory now divided into North and South Dakota; in Montana, 20,595; in Washington, 23,955.

The Indian question from 1870 to 1880 was one of great difficulty. The Sioux were everywhere on the warpath. General Custer was slain and practically his whole force was wiped out at the Little Big Horn on June 25th, 1876. Chief Joseph's retreat came to an end on October 4th, 1877, by his surrender with
578 the words, "Where the sun now stands I will fight the white man no more." Some of the work done on the railroad in 1879 was under military protection, for bands of warlike Sioux roamed over the whole of eastern Montana and western Dakota. In two decades after work was begun on the Northern Pacific the Indian question was settled. All hostile bands were subdued and confined to permanent reservations. Government troops, supplies, and mail were carried safely and expeditiously over the completed line at rates established by Congress. Out of the wilderness of 1870 had been erected by 1899 the Sovereign States of Washington, Idaho, Montana, and Dakota. Cities had grown up. Agriculture was spread far and wide over the country, and mines were opened up in the mining regions. North Dakota, by the Census of 1890, had a population of 182,719; Montana, 132,159; and Washington, 349,390. The greater part of this growth in population had come in the decade 1880–1890, thus in North Dakota in 1880 the Census showed 36,909 persons, in Montana, 39,159, and in Washington but 75,116.

I think it may fairly be said that the end which the Act sought, as stated by the Supreme Court, had been attained; a line had been constructed and was in operation; a highway for the transportation of mails, troops, munitions, and public stores had been established. True, it had not come about within the time designated in the legislation. Instead of 1879, the line was opened up in 1883 to Portland, thence to Puget Sound, and in 1887 from Wallula to Puget Sound. It is doubtful, however, whether the progress and development of the Northwest would have come very much faster had the work been done at the designated date. As the road was built westward population followed and spread out along the completed portions.
579 Some increase in population occurred in anticipation of the completion, but by the year 1883 everything, and more, practically had been accomplished which Congress could have hoped for by the construction of this road.

580

III

THE PLEADINGS

This suit is brought under the provisions and by the direction of the Act of June 25, 1929. By the terms of that Act all lands within the indemnity limits of the railroad which on June 5, 1924, were embraced within the exterior boundaries of any National Forest or other Government reservation and which, in the event of a deficiency in the land grant, were available to the Railway Company, by indemnity selection, or otherwise, in satisfaction of such deficiency were to be taken out of the operation of the land grants and retained by the United States as part of the Government reservations wherein they are situate, free of all claims, if any, which the Railroad Company or its successor, the Railway Company, might have to acquire the same. Providing, however, that for such lands the Company should be entitled to receive compensation from the United States to the extent, and in the amounts, if any, the Courts should hold compensation might be due. It declared forfeited all unsatisfied indemnity selection rights claimed by the Railroad Company, or the Railway Company, or any person claiming under either of them, together with all claims to additional lands under the grants by Congress to the Railroad Company. It expressly declared the right reserved to the United States to amend the Act of 1864, and the Joint Resolution of 1870 should not be considered as fully exercised or waived in any way by the Act, and its passage should not be construed as evidencing the purpose or intention of Congress to depart from the policy of the United States as expressed in the

Resolution of May 31, 1870, relative to the disposition of granted lands; and the right was expressly reserved to the
581 United States at any time to enact further legislation relating thereto. It declared that the provisions of the Act should not be construed as affecting the present title of the Railroad Company, or its successors, the Railway Company, or any subsidiary of either or both, to its right-of-way, or to lands actually used in good faith in the operation of the road. The Attorney General was directed to institute such suit or suits as in his judgment might be required to remove the cloud cast upon the title to the lands belonging to the United States as the result of the claims of the Companies; to procure a judicial determination of all controversies and disputes respecting the operation and effect of the grants, and action previously had under them, and that a full accounting between the United States and the Companies be had of the land grant. It further directed that in such proceedings there should be submitted to the Court for determination to what extent the terms and conditions in the granting Act had been performed by the United States, and by the Railroad Company, or its successors, including the legal effect of the foreclosure of any or all mortgages claimed to have been placed on the lands by virtue of the Resolution of May 31, 1870, and the extent to which such foreclosure proceedings met the requirements of that Resolution respecting disposition of the granted lands.

It was further directed that by said judicial proceedings it should be determined what lands, if any, had been erroneously patented or certified to the Railroad or Railway Company as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of the grants. And, further, that the United States and the Railroad or Railway Company, or any other person should
582 be entitled to have heard and determined all questions and claims germane to a full and complete adjudication of their respective rights under the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, and all questions of law and fact presented to the joint Congressional committee appointed under authority of the Resolution of Congress of June 5, 1924, notwithstanding that such matters might not be specifically mentioned.

It will be seen from the foregoing abbreviation that in the contemplated litigation directed, it was intended every question from the organization of the company to the date of the Act that had been, or that now might be, raised, should be presented to the Court and finally determined: and that upon such determination should be based an adjustment of the grant.

It is obvious from the recounted history of the Act, as well as from its terms, that the ultimate purpose Congress had in mind was to save the forest and other reservation lands to the United States without compensation to the railroad company. To this end, through an accounting, an adjustment of the grant was to be made by the court in the proposed litigation. If, upon said adjustment, it could be made out that the railroad company had no claim upon these lands, then they were saved to the Government without cost. But if, upon the other hand, it turned out that the company was entitled to indemnify itself out of these lands, or any part of them, direction was made for compensation, the amount to be determined in the cause and time given to Congress to make appropriation for payment. Congress had no thought of assailing the right of the corporation to
583 exist, and to operate its road. On the contrary, its title is confirmed by the very terms of the Act. So, likewise, it had no purpose to undertake in the directed litigation to correct any irregularities in the original organization of the road, or in the so-called reorganization of 1875. Neither had it any purpose of undertaking by any possible available remedy to correct or undo any of the irregularities of stock issue, any of the alleged ultra vires of building branch roads or of the alleged violation of the Act in respect to the building of the telegraph line. While all of these things, and many others, were, doubtless, contemplated by the Act to go into the bill and be litigated, yet they and all other questions were directed exclusively to the one end, an accounting and adjustment of the land grant.

The bill, therefore, in this case, naming the Northern Pacific Railway Company, Northern Pacific Railroad Company, Northern Pacific Railroad Company as reorganized in 1875, Northwestern Improvement Company, Bankers Trust Company, Guaranty Trust Company, and City Bank Farmers Trust Company, as defendants, correctly following the directions of the Act, has for its principal and ultimate purpose the adjustment of the grant. While in successive subdivisions various claimed delinquencies of the railroad company and its successor, the railway company, are charged, they all have for their purpose such adjustment. No remedy is sought on account of any of these delinquencies except in so far as the Government claims the land-grant rights of the defendant are affected. The bill could not go further in respect of these alleged delinquencies because, as determined in the case of United States v. Union Pacific Railroad Company, 98 U. S. 569, the scope of the bill is determined
584 and restricted to the scope of the Act. Therefore, it must continually be kept in mind that every question raised by the bill is to be considered in this respect only.

Roughly speaking, these charges fall into several classes. In the first are comprehended those which relate to the original organization of the company to its reorganization by the foreclosure proceedings in 1875, and to certain alleged irregularities in handling the capital stock of the company, and to alleged ultra vires acts in respect of building various branch roads, in the manner of the construction of the original telegraph line and, perhaps, some other questions of the same sort. In the second class fall those matters intended to reduce the measurement of the grant. These are (a) lands to be deducted on account of the paralleling for a distance the line of the Portage, Winnebago and Lake Superior Railroad, (b) lands falling within the moiety rule at the Wallula Over-lap, (c) deductions on account of the alleged unlawfully circuitous route through the State of Washington. The third class of allegations, recognizing that the measurement of the grant having been established the railroad company would be entitled to receive all lands required to make up that measurement, undertakes to reduce the right of the company in that respect by various charges that through mistake of law or of fact because of legislative misapprehension or by reason of the fraud of the company, lands were erroneously and unlawfully patented or certified to it by the Interior Department. The Crow and Blackfoot Reservation sections of the bill are examples of these. For the same reason, also, the forfeiture declarations of the Act are brought into the bill and sought to be enforced.

To this bill the Railway Compa[illegible]y answers, subdivision by subdivision, and moves to [illegible]smiss all portions of the bill
585 except those purely introd[illegible]ctory and those relating to the expropriation of the forest-reserve lands. It, likewise, moves, separately to each subdivision included within this general motion. It interposes pleas of laches, equitable estoppel, res judicata, and the statute of limitations. The railroad company and the Northwestern Improvement Company adopt these pleadings. The Trust Company defendants join with the railway company in its answer, motions, and pleas, and each pleads separately and additionally that it is a purchaser for value by virtue of the Trust Deed to it alleged in the bill.

The Government filed a reply to these pleadings. The defendants moved to strike the reply, but before the question came up waived the motion. I am of opinion that it should have been stricken and that a reply to anything pleaded by any of the defendants is not allowable under the Equity Rules. I will disregard it and recommend to the Court that it be stricken.

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III

SOME GENERAL PRINCIPLES

There are certain general principles appealed to by counsel on one side or the other as having application to various of the questions in the case. I think it will conduce to clarity to state and define these once and for all.

First. Every Act of Congress granting land is both a law and a contract. This means, for one thing, that the terms of the grant are to be so construed, as is every law, to carry out the intent of Congress, and to that end the cannons of statutory construction alone govern. The rules to get at the proper meaning of private conveyances between individuals, insofar as these rules differ, have no application. The only thing of consequence is the intention of Congress. This Act, as is probably every railroad grant, is a special statute, and its meaning is to be arrived at from a consideration of the special purposes of the Act in the light, not only of the language employed, but of the conditions of the country through which the grant extends at the time of the enactment. It follows, also, of course, that the Act has all the force and constancy of law within the scope of the special purposes. But in every granting Act there will occur provisions temporary in their nature, and ending once and for all when complied with by the grantee; for example, in this case that portion of the Act which directs the gage of the track and the character of construction. Once the road was completed and accepted by the Government, through the agencies appointed by the Act its purposes had been fulfilled, and is without further force. It cannot be said, therefore, that inquiry into such
587 questions remains open until the law shall be repealed. Other portions will be found to remain in force for the life of the grant, being by their very terms continuing. Such, for example, is the requirement of the grant before us that the road should be forever a post route and carry troops and supplies at the rate fixed by Congress. When the terms of such grant have been thus determined, and the grant accepted by the grantee, and, when necessary, performed, the grant in such terms becomes a contract binding on the Government and grantee alike.

Second. The charter of the company is to be regarded as wholly distinct from its land grant. It must be treated precisely as though the original land grant, as was the additional grant by the Joint Resolution of 1870, had been made subsequently. The consequences of, and the remedy for a breach of charter provisions must be measured solely by those rules long before the Act settled and well known, governing the construction and effect of

a special corporate charter. Section 10 declares the effect of failure to obtain the necessary preliminary stock subscriptions with down payment. Of course such failure might be waived by Congress. No provision for waiver is made by the Act and it follows that whether it has been waived must be determined by the established rules of law relating to the subject. So, too, the land grant must be construed and the consequences of the breach of any of its conditions determined by the established doctrine of the law of grants. Thus, section 8 declares the grant to be upon certain conditions subsequent, but the whole subject of the effect of the breach of those conditions, and whether and in what manner the breach might be waived, is left open because Section 9 gives to the Government only an alternative remedy.
588 This seems plain and it has been so established by the Supreme Court in Atlantic and Pacific Railroad Company v. Mingus, 165 U. S. 413.

Third. The doctrine of strict construction, so far as it is sought to be applied in this case, gives me little difficulty. The corporation, under its charter, can take or exercise such powers only as are expressly granted and such as are necessary to the exercise of those granted. Some of the powers charged to have been exercised by the railroad company are clearly ultra vires, and others are doubtfully so. I shall consider all, however, as unauthorized when I reach a consideration of those subjects.

It is an ancient and certain rule that a grant by the Sovereign to a subject is to be most strictly construed, for it is said nothing shall pass by intendment. Every asserted right under the grant must have been conveyed in clear and unmistakable terms. In the grant of 1864 most debatable provisions have long since been settled by the Supreme Court. The parallel clause in issue, as applied to the Portage, Winnebago, and Lake Superior line is the only exception. To that I think the doctrine applies. Also, in the construction of certain terms of the Joint Resolution of 1870 the doctrine has application. But this rule of strict construction should not be invoked in determining the effect of mere regulatory and administrative clauses of either the original Act or the Joint Resolution. These neither define or measure the grant. In a general sense they may be said to be quite unimportant. Some are committed to the supervision of the Interior Department and its construction should be adopted. As to others, the long-followed practice ought not to be disturbed.

Fourth. The equitable maxim that He who seeks equity
589 must do equity, is as old as equity jurisprudence, and in a sense is a source of every doctrine and rule of equity, because it expresses the governing principle that every action of a court of equity in determining rights and awarding remedies

must be in accordance with conscience and good faith. As a practical principle, however, the maxim has a much narrower and more special meaning. But even in the narrower sense it has a most extensive application in every kind of litigation and to every species of remedy. Mr. Pomeroy says the meaning of the maxim is that whatever be the nature of the controversy between two parties, and whatever be the nature of the remedy demanded the Court will not grant the equitable relief to the party seeking its aid unless that party will acknowledge and provide for all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject matter of the controversy. Its effect is that the court will give the plaintiff the relief to which he is entitled only upon the condition that he has given, or consents to give to the defendant such corresponding rights as he, also, may be entitled to in respect of the subject matter of the suit. That rule, however, applies only to the party appealing as actor to a court of equity for equitable relief; that is, either some relief equitable in its nature, as an injunction or cancellation, or equitable because it may come within the power of the court to administer by virtue of its concurrent jurisdiction, as an accounting, or a pecuniary recovery. It assumes that the party seeking relief but for the application of the rule would be entitled to it. Otherwise
590 there would be no occasion for invoking the rule. It is to be added further that sometimes the relief to be secured to the defendant under the application of the rule might be obtained by him if he were the plaintiff. This, however, is not indispensable, or always possible. The rule may, and frequently is, applied to secure to the defendant equitable right or equitable relief which could not be obtained by him in any other manner—that is, which a court of equity, in conformity with its settled methods, either would not, or could not, have secured or conferred in a suit brought by him as plaintiff for that purpose. The rule has frequent application in cases of forfeiture. I shall defer discussion of that, however, until I reach that subject. 1 Pom. Eq. Sec. 385, et seq.

Fifth. So, likewise, is the rule ancient and far reaching that He who comes into equity must come with clean hands. This maxim is much more efficient and restrictive in its operation than the maxim requiring the plaintiff to do equity. It assumes that the suitor asking aid of the court has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject matter and transaction in question. It means that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has

violated conscience and good faith, or other equitable principle, in his prior conduct concerning the subject matter of the litigation, the doors of the court will be shut against him in limine.

The doctrine, however, is applied only to the plaintiff. It
591 has no application whatever to the defendant who is brought into court in invitum, and whose position in the litigation is purely defensive. And it makes no difference whether the defenses interposed by him are denials or affirmative matter so long as the pleadings are defensive only. But whenever the defendant, on his part, becomes an actor by setting up what, under the Code and under equity rule 30 is termed a counter claim, then as to such counter claim the rule applies in full force. For the very apparent reason that as to the counter claim he has in fact become the plaintiff. 1 Pom. Eq. Secs. 397–398.

Over and over again in the argument the Government invokes this maxim against the defendants. It is obvious, however, from the foregoing that the maxim can have no such application. None of the defendants here has interposed a counter claim. All of them by various pleas have set up affirmative defenses, but notwithstanding they are affirmative they are defensive only. Again the defendants have not come into a court of equity so that it must be inquired whether their hands are clean. They have all been brought in by the processes of this court, and are seeking only to defend against the relief sought by the plaintiff. In order, therefore, that I may not have to recur to the subject again I hold that this doctrine at every stage of the consideration of the case must be disregarded.

Sixth: It has been said there is no wrong against which the law does not provide a remedy. For general statement that is probably true. However, it must be emphasized that every right asserted by a party litigant is necessarily and inevitably dependent for its protection or enforcement upon the remedy the law affords. The same remedy is not open to correct every wrong. The same remedy is not open to enforce every right. Correction of
592 every wrong, and the enforcement of every right, has its own correlative remedy. If, therefore, a litigant comes into court asserting his right, but declining to seek the remedy, or even to accept the remedy, and the only remedy which the law gives him for a violation of that right, the practical result is the same as though he did not have the right, or as though it had not been violated. In many of the subdivisions of this bill setting out the rights of the Government and the wrongs of the defendants, not only does the Government not seek any remedy that the law has ever appointed for the protection of the asserted rights, but frequently in argument disclaims any intention of seeking that remedy, or to accept it if tendered. For this rea-

son I have thought it well to point out distinctly the foregoing principles.

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IV

CONSIDERATION OF THE DEFENDANTS' DEMURRERS AND PLEAS

1. General motion to dismiss.—The theory of this motion is that as respects the several subdivisions comprehended within its terms no case of any sort is stated, whether these subdivisions be viewed separately or all put together and treated as one cause of action. Both in oral argument and in his printed brief Mr. Lyons insists that the bill is framed upon an erroneous theory under the doctrines declared in United States vs. Union Pacific Railroad Company, 98 U. S. 569. That case does establish certain general principles which will govern and control many, if not most, of the allegations in the various subdivisions in this bill; (a) "A court of justice is called on to inquire not into the balance of benefits and favors on each side of a controversy, but into the rights of the parties as established by the law as found in their contracts, as recognized by the settled principles of equity and to decide accordingly," and that if the Government in a liberal manner had aided the company in its feeble infancy "when its life and usefulness were very uncertain" * * * and did all that it could to strengthen, support, and sustain it. Since it has grown to a vigorous manhood it may not have displayed the gratitude which so much care called for. If this be so, it is but another instance of the absence of human affections which is said to characterize all corporations." (b) That the Government did not stand as to matters there in controversy as parens patriae, or as a trustee. Conceding that Congress might have directed a proceeding by the Attorney General to declare
594 the franchises of the company forfeit, or it might have ordered a bill to inquire if the company was insolvent, and if so to wind up its affairs and distribute its assets, or by many modes in which the legislature could have called into operation all judicial powers known to the law. Still, it had not done so, and, therefore, none of these things were open to question. That, after all, the Union Pacific was but a railroad company with the ordinary powers of such corporations, and the Statute which conferred the benefits on this company, the grant of lands and the right-of-way, did the same for other corporations already in existence under statute of territorial charter, and that it could not be supposed that a trust could be asserted in the Federal Government which would authorize suits like this against other land-grant railroad companies; and (c) that in respect

of frauds and other irregularities alleged in the bill, although properly following the directions of the Act in that respect, the United States had no interest and could not as to them maintain an action. If other stockholders or other persons directly interested in the corporation were injured thereby, the right to correct lay with them, and not with the Government.

The distinction between that case and this is that here the Government has a direct and a certain interest in adjusting the land grant. In this case both the Act upon which the suit is brought and the allegations of the bill seek an adjustment of the grant. Nothing of the sort was either in the Act or in the bill in the Union Pacific case. I am clear that the Government may have the grant adjusted by this court instead of committing
595 that adjustment either to the Commissioner of the General Land Office or to the Secretary of the Interior as had previously been done. I can see no reason either why it is not as well for the interests of the defendants that the grant be finally adjusted and all matters of controversy between the Government and them in respect of the land grant forever set at rest. Methods of court procedure will not at all prevent, or even impede, doing this. The principles are quite simple. There is, first, the prima facie measure of the grant—a mere matter of computation—which can be made by the Interior Department or by the land department of the railroad. When it shall have been determined that any deductions should be made from this prima facie measure such deductions are easily computable. The measure of the grant having been thus determined, the next inquiry will be what extent has the grant been satisfied by lands patented to the company. Deducting these from the measure of the grant will give prima facie what the railroad is yet entitled to receive. If, by reason of the forfeiture provision of the Act in question, or of any other matters alleged in the bill, the company is not entitled to receive a portion of this prima facie balance, when that shall have been determined and the extent of it fixed, it again becomes but a matter of computation. Thus the final decree may settle forever all disputes which have existed up to the present time between the Government and the railroad. Mr. Lyons insists that the purpose of his motion is to eliminate everything from the bill but the expropriation of the forest lands. Without stopping to inquire whether the granting of the motion would have that effect, but accepting as correct his interpretation
596 of it, if it were sustained there could be no accounting of the grant. For this reason, and this reason only, I recommend that the general motion to dismiss be denied. I reach this result without reference to any question concerning the sufficiency

of the allegations contained in the several subdivisions covered by the motion. If it should be held that each of these subdivisions, taken separately, do not have any pertinency to any question in this case, and should, therefore, go out, or that all of them taken together stated no case, it still would not affect in any way the conclusion to which I have come as above stated.

The defendants' separate motions, directed respectively to the several subdivisions I will consider in connection with the subject matter to which they severally relate.

2. The Plea of Laches.—It is settled beyond question that when the Government sues in its sovereign right the doctrine of laches has no application. When, however, the Government descends from its sovereign position to enter into private contracts, or to engage in private business, and in respect of such contracts or business comes into a court of equity the rule of laches does apply to it as to any other litigant. Counsel agree upon this. They disagree, however, about whether this suit is by the Government in its sovereign capacity to enforce and protect a public right, or whether it be a suit upon private contract by which in exchange for the road constructed the Government granted land to the company. Upon this question I am clear. The grant was of public land, owned and to be administered by the Government for the benefit of the public. It was in aid of a public
597 purpose, the building of a post route, a public highway over which to transport its troops, munitions and supplies, and to aid in the redemption of a country, through which the road ran, from a wilderness. I entertain no sort of doubt that in either and in both aspects, therefore, of the grant, it was public, the exercise of a sovereign power and the Government is in this case suing in its sovereign capacity, to enforce sovereign rights. The plea of laches must, therefore, be overruled. I am expressing no opinion whatever upon the question as to whether, or, if at all, how far the doctrine of United States v. Stinson, 125 Federal, 907, S. C. 197, U. S. 200, may have application. The rule of that case is one of evidence only. It has no application to a plea which is interposed in bar of the action.

3. Res judicata.—Under pleas of res judicata various judgments are set up as adjudications, and the records of the judgments thus pleaded are in evidence. The Supreme Court has in various cases stated the general principle, perhaps nowhere better than in Oklahoma v. Texas, 256 U. S. 70. Briefly, that doctrine is that a question of fact or of law definitely put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense between parties then before the court is conclusively settled by the final judgment or decree therein and it cannot be further litigated in a subsequent suit

between the same parties, or their privies, whether the second suit be on the same or on a different cause of action. If the second action is upon the same claim or demand the judgment in the prior action is an absolute bar, not only of what was decided, but of what might have been decided. If the second action is upon a different claim or demand then the judgment in the prior action is an estoppel only as to matters actually
598 litigated and determined. It is clear that where the second suit is upon the same cause of action as the former, the defense must be made by a plea in bar. It is also clear where the second suit is upon a different cause of action, the fact or facts adjudicated in the first action are but evidence, conclusive it may be in its nature, but still evidence only of the facts. The former adjudication may be, I think must be, offered in evidence upon the issue of the facts determined by it.

It is fundamental under any system of pleading that an issue cannot be raised upon matters of evidence. I think by pleas of former adjudication in this case that defendant is seeking to raise an issue upon a matter of evidence pure and simple. For this reason only I hold that the pleas of res judicata must be overruled.

As your Honor may, however, take a different view, I will add that the several cases pleaded do adjudicate the matters and things to which they are pleaded. This is a general statement. It may be possible that there are certain things pleaded as established by the adjudications that are not fully settled by the cases pleaded. In the view I take of the cases to which these pleas go I do not find it necessary to examine each of those cases in detail.

4. Estoppel, Acquiescence, and Waiver.—Equitable estoppel had its origin in the doctrines of courts of equity. It has been adopted, as well, by courts of law. In its original sense there could be no equitable estoppel where both parties to the transaction, whatever its nature, knew all the facts. It was es-
599 sential that one party, having knowledge, misled the other party who, in ignorance, acted upon the misleading statements or conduct to his prejudice. Equitable estoppel in that sense I think is not pleadable against the United States in bar of this suit. The matter, however, is not of much practical importance.

Every lawyer who has had any considerable practice in courts of equity knows that at this day the term is not confined to the restricted sense above stated. It is constantly applied to situations in which there is no pretext that the person pleading estoppel was ignorant of the facts. There exists only the element of words or conduct inducing the opposite party to believe that

the right existing in favor of the person sought to be estopped would not be insisted upon and consequent action by the other party to his prejudice. It is apparent, however, that the term, as thus used, amounts to little else than waiver or, at least, acquiescence and waiver combined.

The precise doctrine of acquiescence, as here used, if of equitable origin. It is defined by Mr. Pomeroy at section 965, Vol. 2, as an act perhaps not deliberately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing and intended, to some extent, at least, to carry it into effect, and to obtain or claim the benefits resulting thereby; and the doctrine is that a party thus having recognized and having permitted something to be done carrying the transaction into effect, and obtaining or claiming benefits therefrom, although perhaps only to a partial extent, cannot afterward be suffered to repudiate the transaction, and allege its voidable nature. "When a party with full knowledge, or at leas with sufficient
600 notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity". While it is, of course, true that such acquiescence rests in conduct, still the intention and purpose of the conduct is to be derived wholly from the surrounding circumstances and necessary result of such conduct.

Waiver, on the other hand, had its origin in the early doctrines of the common law and was in use, in a limited number of cases to be sure, long before the doctrine of equitable estoppel had been invented by the courts of equity. While it has been said that waiver belongs to the family of estoppel, and while the terms "waiver" and "estoppel" are often used interchang'ably they are, nevertheless, distinguishable terms. Waiver does not require any element of estoppel at all. It is of the essence of waiver that there shall be an intentional relinquishment of a known right, and it assumes necessarily the existence of opportunity to choose between relinquishment and enforcement of that right. Again waiver depends on what one, himself, intends to do, and involves only the acts and conduct of one of the parties, and may exist quite regardless of the attitude of the other.
601 Waiver does not necessarily, although it usually does, im-

ply that the other party has been misled to his prejudice, or put in an altered position. A waiver may arise by express declarations, or by acts, conduct, and indirect declarations, and if these are sufficient to establish the intention to waive, then they are sufficient to constitute a waiver. It is, also, true that while waiver is not in the strict sense of the term estoppel, yet where a party to a transaction induces another to act upon the belief that he has waived, or will waive, certain rights, remedies, or objections which he is entitled to assert, it is very commonly said that he will be estopped thereafter to insist upon such rights, remedies, or objections to the prejudice of the one misled. A very common use of the term estoppel in this sense is found in the cases of executory contract to convey upon payment of the purchase price at stated intervals, the time of payment being made of the essence. The courts say that where a specified payment is not made on time but is subsequently tendered and accepted by the grantor, he has waived the right to insist upon forfeiture because of delay in payment, and that he is, therefore, or sometimes it is said, thereafter, estopped to insist upon a forfeiture. At common law from the earliest days it was held that in a grant upon condition subsequent the grantor might waive the breach of the conditions by the grantee expressly or in pais, and here the question principally arises upon the conditions subsequent in the land grant.

I think it is perfectly plain that as Congress did grant upon conditions subsequent it must have intended to bind
602 itself and the Government to all the rules of law governing such conditions, including waiver.

It has long been settled that Congress has not only legislative power over the public domain but that it exercises, also, the power of a proprietor. It may "deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale," Camfield v. United States, 167 U. S. 524. And the Supreme Court declares in United States v. Midwest Oil Company, 236 U. S. 475, "Like any other owner, it can waive its strict rights, as it did when the valuable privilege of grazing cattle on this public land was held to be based upon an 'implied license growing out of the custom of nearly a hundred years.'" And again the Court said, "So, too, in the early days of the 'Government, by its silent acquiescence, assented to the general occupation of the public lands for mining.'" In Davis vs. Gray,[1] 16 Wallace 204, the court was considering a land grant by the Texas legislature in aid of the construction of a railroad by a corporation created by the Act. As usual, in

[1] See also U. S. v. Jackson, 280 U. S. 184.

such grants, there were conditions subsequent attached, and speaking of these the court said (232) "Breaches of such conditions may be waived by the grantor expressly or in pais. Such waiver is expressed in the Statutes relating to the subject, to which we have referred, except the Act creating the Transcontinental Company, and there it exists by the clearest implication." And, again, on the same page the court said: "When the State becomes a party to the transaction, as in the case before us, the same rules of law are applied to her as to private persons
603 under like conditions. When she or her representatives are properly brought into the forum of litigation neither she nor they can assert any right or immunity as incident to her political sovereignty."

When the Eastern Terminus case, United States v. Northern Pacific Railroad Company, 95 Fed. 864, was in the circuit court of appeals that court, assuming that the question of forfeiture on that portion of the route between Thompson Junction and Ashland was properly presented, held that Congress, having stood by and permitted the railroad to build out of time could not be heard to say ten years after the building that the grant was forfeitable. "The act of the railroad company in building its road and receiving the land pertaining thereto, was commendable. If one is unable to perform his promise at the time agreed upon it is not wrong, either in morals or in law, but eminently just and right that he should perform it thereafter, especially when the promisee accepts and requests it. Courts of equity sometimes enforce the specific performance of a contract, but they never undo its execution when it has been performed on the one hand, and its performance has been accepted on the other, with a full knowledge on the part of both parties of the facts which conditioned its completion." When the case reached the Supreme Court, United States vs. Northern Pacific Railroad Company, 177 U. S. 435, the Court held that the question of forfeiture could not be considered because no forfeiture had been declared by Congress, and the case was not brought for that purpose under the authority of Congress. However, the court remarked, "Undoubtedly there would seem to be room for a fair presumption that Congress was aware of the action of the President and of the functionaries of the land department in the
604 particulars before mentioned, and approved of the same. It is not, as put by Counsel of the Government in his able brief, the case of a waiver presumed from mere nonaction, but from nonaction in the special circumstances disclosed," p. 442.

My conclusion, therefore, upon both principle and authority, is that the Government of the United States in this case may be

bound by the doctrine of acquiescence and waiver. Whether the facts are sufficient to make out such a case I will consider when I reach the subject of forfeiture.

605

V

ORIGINAL ORGANIZATION OF THE COMPANY

By subdivision VI of the bill it is alleged that in the latter part of 1864 certain persons pretended to subscribe for 20,075 shares of said stock and pretended to pay thereon into the treasury of the company $10 per share; and that in December of that year said subscribers elected directors who in turn elected officers. That in January 1866 an assessment of 90% on all the subscribed stock was made, and on February 2, 1870, the assessment being unpaid, the stock was by the Board declared forfeited. It is then alleged that notwithstanding the provisions of the Act of July 2, 1864, requiring bona fide subscription and an actual 10% down payment of 20,000 shares of stock as a condition precedent to the organization of the company, no such bona fide subscriptions were made, and that no payment of 10%, or any part thereof, was ever paid into the treasury of the company. That both the subscription and the payment was a pretense and a sham and fraud against the Northern Pacific Railroad Company and against the United States, and constitted a breach of the contract between the Company and the United States. For the purposes of the demurrer to this paragraph of the bill these allegations must be accepted as true. It follows, therefore, that if the failure to subscribe and pay for the stock as prescribed by the Act is now open to inquiry, and has not in any way been cured, that the company never came into existence as a corporation under its charter; that no lands granted by the Act ever passed to it or could pass to it, for by the very terms of the Act the failure to subscribe and pay was declared to render
606 the Act in all of its parts null and void. It was not necessary for the Government to institute any procedure to have the failure to subscribe and pay determined or the effect of it; it was necessary only for the Government to refuse to proceed further with the grant, whereupon the Northern Pacific incorporation, and with it the land grant, came to an end once and for all. But Congress did not take this position. On the contrary, beginning very soon after the pretended organization of the company by a series of acts and joint resolutions Congress treated the railroad company as properly incorporated.

By section 2 of the Joint Resolution, approved May 7, 1866, it was resolved that the time for commencing and completing the

Northern Pacific Railroad, and all of its several sections, should be extended for a term of two years (14 Stat. 355). This Act, of course, was after the attempted subscription and organization pleaded in the subdivision under consideration. By Joint Resolution, approved July 1, 1868, it was enacted that section 8 of the Act of July 2, 1864, should be so amended as to read as follows: "That each and every grant, right, and privilege herein, are so made and given to and accepted by said Northern Pacific Railroad Company upon and subject to the following conditions, namely: that the said company shall commence the work within two years after the second day of July 1868 and shall complete not less than one hundred miles per year after the second year thereafter, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, 1877" (15 Stat. 255).

607 By Joint Resolution, approved March 1, 1869, it was enacted that the consent of Congress is thereby given to the Northern Pacific Railroad Company to issue its bonds and to secure the same by mortgage upon its railroad and telegraph line for the purpose of raising funds to construct said railroad and telegraph line between Lake Superior and Puget Sound, and also upon its branch to a point at or near Portland, Oregon; and the term "Puget Sound" as used in this Resolution and in the Act incorporating the company should be construed to mean all the waters connected with the Straits of Juan de Fuca within the territory of the United States (15 Stat. 346). And by Joint Resolution, approved April 10, 1869, the Northern Pacific Railroad Company was authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound to be determined by the company and to connect the same with its main line west of the Cascade Mountains in the Territory of Washington; such extension being subject to all the conditions and provisions and the company in respect thereof being entitled to all the rights and privileges conferred by the Act incorporating the company, and all Acts additional to and amendatory thereof, but with the restrictions that it should not be entitled to any subsidy or any additional lands on said extensions of its branch line except for right of way, and that at least 25 miles of the extension should be constructed before July 2d, 1871, and 40 miles per year thereafter until the whole of said extension should be completed. And then came the Joint Resolution of May 31st, 1870, the terms of which I have already stated. Many Acts of Congress followed thereafter begin-

608 ning with July 15, 1870, requiring the railroad company to pay survey fees to the plaintiff, and ending with the Act of March 5, 1931, granting to the Butte Anglers' Club of Butte,

Montana, a certain patent and in lieu thereof a patent to the Northern Pacific Railway Company of another tract of land. I will not specifically refer to these several Acts—they are set out in defendant railway company's answer (pp. 2 to 7, inclusive). From the completion of the road to the beginning of this suit Government mail, supplies, troops, and munitions were carried at rates fixed by Congress pursuant to the powers delegated in the Act of July 2, 1864. From the time of beginning work on the road with the completion of each 25-mile section the President appointed commissioners to report, and these reports were by him accepted. The maps of general location and of definite location filed in the office of the Secretary of the Interior were approved. The land falling within the limits of the grant were withdrawn from sale or entry. In short, Congress and every branch of the Government recognized and treated the Northern Pacific Railroad Company as though it were building, and, after its completion, had built the Northern Pacific Railroad in conformity with the Act of July 2d, 1864, and was entitled to the grants conferred by that Act. Indeed by section 4 of the Act under which this suit is brought it is declared that the provisions of the Act shall not be construed as affecting the present title of the railway company or its successor or any subsidiary of either or both to the right of way of said road, or to lands actually used in good faith in the operation of said road. Here in the Act,
609 which is the very foundation of the Government's case, Congress of necessity and in explicit terms recognizes that the railroad did come into existence; that there was granted to it a right of way and that it built the road and ex necessitate had ever since and then was operating it. How is it possible in a suit brought under this Act to seek an adjudication that the road was never incorporated, that no grant either of land or right of way was ever made to it I will not now stop to inquire.

Now, unless these things are to be regarded as mere mummery, some effect must be given to them. There must be some legal principle by which they can be interpreted with reference to the matters and things alleged in the subdivision under consideration.

I think the doctrine of legislative recognition of corporate existence governs. That doctrine is thus stated by Mr. Thompson in Volume 1 of his work on corporations (sec. 512): "A doctrine frequently admitted by American courts is that, where a body of persons act as a corporation, and the Legislature passes an act which distinctly recognizes their corporate character, they may be deemed to be rightfully a corporation in consequence of such legislative recognition. It has been frequently ruled that defects in the organization of corporations, which have been organized under a general law, may be cured by subsequent legislative rec-

ognition of the corporation. The rule is that, although the organization of a corporation may be irregular, in such a sense that it could be overthrown in a direct proceeding by the State, yet where its corporate existence has been recognized by the
610 legislature, this will make it a good corporation for the purpose of collateral proceedings." In Volume 14, Corpus Juris, Section 74, p. 101, the rule is thus stated: "* * * and it has frequently been decided that defects in the organization of corporations, whether organized under a special Act or under a general law, may be cured by subsequent legislative recognition of the corporation. And it is the rule that although the organization of a corporation may be irregular in such a sense that it could be overthrown in a direct proceeding by the State, yet where its corporate existence has been recognized by the legislature this will make it a good corporation for the purposes of collateral proceedings." And as illustration of the principle the writer further says: "An Act amending the charter of an alleged corporation being a recognition of its corporate existence cures any defect in the corporation and such an operation has been ascribed to an act of the legislature changing the name of a corporation, recognizing it by name and extending and continuing its corporate rights and privileges, granting lands to the association, or reciting that it is a corporation holding lands." And at Section 214, p. 208, of the same Volume, the writer says: "Defects in the creation or organization of a corporation may also, subject to constitutional limitations, be cured by a general law or a special Act of the legislature amending the charter and granting additional power or franchises or otherwise clearly recognizing the corporation as a legally existing body." Within this principle and in almost every application that is stated illustratively, the organization of the Northern Pacific Railroad Company is brought by the recited Joint Resolutions of 1866, 1868, 1869, and 1870. By one, the time for commencement and
611 completing the road is extended: by another, not only is the time extended but it is expressly declared that every grant and privilege are given to and accepted by the railroad upon new conditions, namely: new time for commencing and new time for completing: by another, consent is given to the company to issue its bonds; by another, that the railroad company is authorized to extend its branch line from Portland to Puget Sound and to connect it by the branch line over the Cascade Mountains from some convenient point on its main line, and, finally, by the Joint Resolution of May 31, 1870, which all agree is amendatory and supplementary to the original Act, new grants are given, and new privileges are extended, new conditions are stated, and in specific and somewhat detailed terms authority to mortgage is conferred.

In Street v. United States, 133 U. S. 299, an act of Congress for the purpose of reducing the officers in the army authorized the President to eliminate from it such officers as were unfit for the discharge of their duties by reason of a cause which had no meritorious claim upon the consideration of the Government; and made a general grant of power mustering out the residue. One, Street, was mustered out by the President under the power conferred. He challenged the regularity of the President's order. In answering that challenge the Court put it upon several grounds, but, amongst others, the doctrine we are now considering, using this language (p. 307): "The power which can direct what proceedings shall be had can approve and make valid any proceedings which are actually taken. The power which can give authority to act can ratify any act that is taken, and
612 generally legislative recognition of an Act of a corporation validates the Act or the corporation, although neither one nor the other may have had full prior legal authority." In Comanche County v. Lewis, 133 U. S. 199, the question came up in an action brought by holders of coupons attached to several classes of bonds, some of which the Circuit Court had declared to be valid, and others which it had declared void. These bonds were issued by Comanche County in the State of Kansas. The history of the State, so far as necessary, was related by the Court, and certain statutes and opinions of the Supreme Court of that State were quoted. The agreed statement of facts showed that the organization of Comanche County was effected solely for the purpose of plunder by a set of men intending to secure a de facto organization and issue the bonds of the county, register and sell them to distant purchasers ignorant of the facts, and enrich the schemers while plundering the future inhabitants and taxpayers of the county, and that in the Spring of 1874, all of said schemers, together with those who were the said de facto officers of the county, left and never returned and the county remained with its organization totally abandoned until February 1885, when it was organized, as in cases of unorganized counties. The Court remarks that if this were all the facts a very interesting inquiry would be opened, but held the ample power delegated by the Constitution to the legislature enabled it to not only organize counties in any manner it saw fit, but also to validate by recognition any organization already existing, no matter how fraudulent the proceedings theretofore had been. After citing certain Kansas cases it said that it was universally affirmed
613 that when a legislature had full power to create a corporation its Act recognizing as valid a de facto corporation, whether private or municipal, operates to cure all defects in steps

leading up to the organization and makes a de jure out of what before was only a de facto corporation. It was assumed also in the opinion that the fraudulent organization stipulated was de facto and this, according to the Kansas case cited, was necessary to create an organization upon which a recognition might act. Of course the doctrine is not confined, as by the Kansas cases, to recognition of a previous de facto organization, although it does extend to that as well. In Andes v. Ely, 158 U. S. 313, the question came up in this form: bonds of a town had been issued by virtue of an Act of the legislature of the State of New York, prescribing the procedure, and the necessary jurisdictional steps to authorize the issue. It was contended on grounds, unnecessary to be here recited, that the proceedings to issue the bonds were fatally defective, and the bonds void. There came in question, also, the legal incorporation of the railroad company in aid of which the bonds had been issued. In answering this the Court said: "Further, after the contract had been made and the bonds issued and the stock received by the town the legislature of the State of New York passed on two successive years Acts authorizing the town to sell and dispose of said stock. At a special town meeting held after the passage of the first Act, the town voted not to sell, and at a meeting held after the second Act it voted to sell. These two Acts of the legislature were distinct recognition of the existence of the corporation known as the Delhi and Middletown Railroad Company, whose stock, 614 held by the town, the latter was permitted to sell," and because of this recognition, and for other reasons, it was held that the issuance of the stock was valid. In Davis v. Gray, supra, 16 Wallace 204, the question came before the Court in yet another aspect. The suit was by a receiver of a corporation against the Governor of the State of Texas respecting the land grant of the Memphis, El Paso, and Pacific Railroad Company, and it was insisted that the corporation had ceased to exist. To that the Court made two answers: that there had been no judgment of ouster and dissolution, and, secondly, that the offenses and punishment denounced by the Act had been condoned and waived by the subsequent action of the Legislature. The Court referred to certain Acts, saying that they each and all had that effect, and referring specifically to the Act to incorporate the Transcontinental Railroad Company, on July 27, 1870, authorizing the company therein named to purchase the rights, franchises, and property of the Memphis, El Paso, and Pacific Railroad Company, heretofore incorporated by that State, as a clear affirmation, by implication, of the existence of the corporation, and of the possession of the rights, franchises, and property conferred by its charter. "What is implied is as effectual as what is

expressed" (223). "These considerations are so clearly conclusive that it is needless to advert more particularly in this connection to the legislation in question, or to pursue the subject further. There is no warrant for the proposition that the corporation had ceased to exist."

In People vs. Perrin, 56 Cal. 345, the question was before the Supreme Court of California in a direct proceeding by the State in the nature of a quo warranto to inquire into the legality of the existence of the defendant, La Societe Francais d'Epargnes et de Prevoyance Mutuelle as a corporation. The question arose on demurrer to the complaint. It appears that the original incorporators filed a certificate of incorporation in which they omitted to state the amount of the company's capital stock, or the number of shares of which it would consist. The object for which the corporation was formed was to receive from its members deposits of money, to preserve the same from loss, and to find secure and profitable investment therefor. At that time the only law in force which provided for the formation of corporations for trading, and so forth, was the Act of April 14th, 1853. There was in that Act no authority for the incorporation of any company without a capital stock consisting of a specified number of shares. It was insisted, however, that the Act of 1853 had, since the incorporation of the defendant, received legislative construction by an amendatory and supplemental Act approved March 4, 1870. The first section of the latter Act provided that all corporations formed under the provisions of the former Act for the purpose of receiving from the members thereof, and others, deposits of money, and so forth, might thereafter receive deposits of money from minors and married women. It is clear that by the terms of the Act of 1870 the right to receive deposits from members was recognized and to it was added the other right to receive deposits from minors and married women. This is a perfect illustration of the doctrine of legislative recognition. And speaking of this effect of the Act of 1870, the Courts say: "This we conceive to be too plain to admit of argument. No change of phraseology could make it planer." And then add, by a subsequent Act, approved March 24, 1870, the powers of corporations formed under the Act of 1853 to transact Savings Bank business is recognized in nearly, or quite the same language. And then the Court adds, "In view of the provisions of these Acts, it seems to us the State is estopped from denying that corporations can be formed under the Act of 1853 to carry on the business which this corporation is organized to carry on", and the Court concluded therefore that the demurrer to the Complaint should be sustained.

In State ex rel. John D. Caton v. The Ottawa Hydraulic Company et al., 115 Ill. 281, the question came up on an information filed by the State's Attorney for LaSalle County, in the nature of a quo warranto. A demurrer to the information was sustained below. The company as a corporate body was assailed by the information on three distinct grounds, first, that its organization was affected by false representations, second, that it had failed to perform the duties which the law under its organization imposed upon it, and, third, that it was and had been from the date of its organization engaged in a business not warranted by its Articles, or as more briefly interpreted, say the court, "The company was assailed on the ground of fraud, misuser and non-user". It was held that the legal existence of the defendant and another company, both of which had been incorporated under a general law of the State, had been recognized by the Legislature and expressly authorized to do the Acts relied on as a ground
617 of forfeiture. It was ruled that the Act was an unequivocal recognition of the defendant's corporate existence, appearing both in the title and the body of the Act, and thereafter justified the misuser charged in the information. It was held that the special Act was, in legal effect, a new charter, but that it recognized the corporate existence of the defendant, confirmed its acquisitions under the original Articles, and enlarged its powers and conferred on it new and independent powers, and after considering the question of constitutional law, judgment sustaining the demurrer was affirmed. There are many other decisions more or less in point declaring the same general principle. To my mind the proposition is clear upon principle. It cannot be supposed that Congress intended, when it authorized a mortgage by the Joint Resolution of May 31, 1870, to secure bonds to be issued by the company and which bonds it knew would pass current in the financial dealings of the country, and when it authorized the building a yet additional road, and a grant of yet additional land in aid thereof by the same Resolution, in effect directing the railroad company to go ahead with the full knowledge that the stock of that company would be sold and bought and generally dealt in to lay a trap for thos who purchased the bonds, and for those who from time to time purchased the stock, or otherwise dealt with the railroad company. It is inconceivable that it had or could have had any other purpose in mind than to recognize the corporation as duly organized and existing under its own grant of charter by Act of July 2d, 1864. Congress may have thought, and very likely did think, that it was a matter
618 of small importance whether these shares of stock had been subscribed for, or whether the small payment of some $200,000 had been made upon such subscription in view of the

agnitude of the enterprise which it was fostering and which desired to go forward. On the other hand, it may have thought thing about it. It may just have assumed without inquiry at the terms of the Act requiring the subscription and the down ayment had been observed. But whether for the one or the her of these reasons, or for whatever reason, when Congress d thus repeatedly recognize this corporation as duly existing, d sent it thus authenticated out into the world to do the work hich it had been authorized to do, it ended the matter once and r all. The Government could not be heard thereafter to dispute e due and regular organization of the railroad company and s de jure existence under its charter even in a direct proceeding ought for that purpose, much less in a collateral attack upon it in this suit.

VI

ORIGINAL INTERESTS AGREEMENT

In subdivision VII of the bill it is alleged that in 1865 the ailroad Company issued as paid 6,000 shares of its capital stock one Josiah Perham and certain of his associates without there aving been paid therefor into the treasury the sum of $100 for ch share of stock so issued and that thereafter this stock was acquired through purchase or otherwise by the railroad mpany.

In subdivision VIII it is alleged that on January 10, 1867, J. regory Smith, then President of the Company, and certain of s associates, entered into agreement in writing whereby they greed to recognize as valid stock of the company to the amount $600,000 issued by said Perham, and to divide the railroad nterprise into 12 shares or parts, valued at $8,500 each, to be ivided amongst themselves exclusively, and entitling the holdrs of interests in the enterprise to representatives on the Board Directors in proportion to the number of shares, or parts of ares held by each; and that on July 31, 1867, this agreement as supplemented by another signed while Smith was President, nd the other signers were directors in the company. This agreeent is referred to in this case as the "Original Interests Agreeent," and it is charged was fraudulent and illegal under the rms of the Act of July 2d, 1864, and that the company peritted these parties to dominate and control the franchise and ock of the railroad company, and to receive from it its capital ock without purchase or subscription thereto as required by said Act. It further charged that in 1869 these persons caused a provisional agreement to be entered into between the rail-

road Company and Jay Cooke & Company of Philadelphia, making Cooke & Company its fiscal agents. That agreement and the supplemental agreement of January 1st, 1870, were executed by Smith as President and by certain others, members of the executive committee of the railroad company. That Smith and his associates pretended to be entitled to the entire $100,000,000 of the capital stock of the company by virtue of the previous alleged agreements, and that the 12 shares of the original interests agreement were increased to eighteen, six to be assigned to Jay Cooke and Company. Various other provisions of this contract are set out very fully, but going to the proposition that by the agreement Smith and his associates, and Jay Cooke & Company, were to receive the whole capital stock in violation of the provisions of Section 10 of the Act of July 2d, 1864, that all people of the United States should have a right to subscribe. It is further charged that in disposing of the stock in this manner the company illegally dissipated one of the means provided by Congress for raising funds to construct its railroad and telegraph line, and that, as a consequence, the company incapacitated itself for constructing any of its road with moneys to be received from subscriptions to its capital stock, and that as a partial or total consequence of such dissipation it failed to construct its road at the rate of progress and within the time limited by the Act of July 2, 1864.

It is obvious that the allegations of these two subdivisions amount only to charges of irregularities in the exercise
621 of its corporate powers by the defendant Railroad Company. Such irregularities could, unquestionably, have been objected to in a proper proceeding by any stockholder of the company. Unquestionably, too, by a proceeding for that purpose, under its visitorial power, the United States could have corrected such irregularities, if irregularities there were; but it is equally obvious that in no way did it affect or impair the corporate existence of the railroad company or its right to exercise its corporate franchises. It is obvious, too, that these charges, whatever their legal effect might otherwise be, have no relevancy whatever to the land grant provisions of the Act. That grant could not be reduced because of such irregularities nor, very probably, could it have been forfeited in whole or in part by reason of them. I fail to see any possible remedy that the Government is seeking by the allegations of these two subdivisions, and I fail to see any possible relevancy in them to the determinaiton of the land grant rights of the defendant railroad company. And, finally, it is perfectly obvious, also, that the principles of legislative recognition which I have discussed in considering the previous subdivision of the bill, apply with even greater force to

these charges. I hold, therefore, that the respective demurrers to these subdivisions should be sustained.

622

VII

FORECLOSURE AND REORGANIZATION OF 1875—SUBDIVISIONS OF THE BILL IX, X, XI, AND XII

Briefly stated, these successive subdivisions allege that under authority of the Joint Resolution of May 31, 1870, a mortgage of date July 1st, 1870, was issued by the company to Jay Cooke and another as trustees to secure certain bonds of the company. It, in terms, conveyed all its property, lands and land grants, and all of its corporate rights, property and privileges, including its franchise to be a corporation. On April 27, 1875, the company made to the trustees, a deed of further assurance conveying all subsequently acquired property, and all its franchises, including the franchise to be a corporation. On April 16, 1875, the trustees began a suit in the Circuit Court of the United States for the Second Circuit, Southern District of New York to foreclose this mortgage on account of default in interest payments on the secured bonds. In due course a receiver was appointed for the company. On June 30, 1875, the bond holders, acting through a committee adopted a plan for the reorganization of the railroad company. This plan appointed a committee to attend the sale of the railroad and the other property of the company which might be ordered in the foreclosure proceedings with a view to purchasing in their own name but for the benefit of all parties coming in under the plan. A committee was directed to assume the management of the railroad and its property upon such
623 purchase and generally to take the railroad and its property out of the hands of the receiver and again put it under the control and management of a Board of Directors thereafter to be elected by the preferred stock holders. It provided that the capital stock should be as fixed in the Articles of Incorporation but divided into preferred stock of the aggregate of $51,000,000 to be issued for the purposes (a) to retire the principal of the outstanding bonds and the interest accrued and to accrue up to July 1st, 1878, (b) to pay the floating debts not protected under orders of the court, and (c) generally to carry into effect the plan. The preferred stock, it was provided, should have all the rights of the common stock, and additionally should be entitled to annual dividends out of the net earnings up to 8% before a dividend should be paid on the common stock. Whenever dividends could be paid on both classes of stock they should be appropriated in proportion to the number of shares

outstanding in the two classes. The preferred stock was to be convertible into certain lands of the company and extinguished by such conversion. The proceeds of the sale of all lands should, likewise, be used to extinguish the stock. Common stock to be issued to the amount authorized by the charter less the authorized preferred stock, however, to have no voting power until on and after July 1st, 1878. On sale of the road and its property and its acquisitions by the committee the old stock holders should surrender their stock into the hands of the committee to be held and used by them either as confirmatory evidence or as muniments of title. Finally, provision was made for the issuance of first mortgage bonds, the particular terms of which
624 it is not necessary here to state.

The purposes of this plan are obvious: (a) to take the road and its property out of the hands of the receiver and place it again under the management of a board of directors to be elected, but of course by vote only of the preferred-stock holders: (b) the contemplated preferred stock was intended to discharge the mortgage bonds and to assure that for a limited time the management of the road should be in the hands of the former bondholders and, therefore, the voting power was given to the preferred stock and prohibited to the common until July 1st, 1878. It was probably supposed that the stock by that date would have been retired by the sale of the lands and by its exchange for others of the company lands. The object of the stock arrangement was to get rid of the outstanding indebtedness, and thus save to the company the road already constructed, the franchise to complete and operate the road under the charter and its land grant. There is not a suggestion expressed or implied to surrender or abandon the charter of the Northern Pacific Railroad Company. On the contrary, the express purpose was to resume operations. It is obvious, too, that the proponents of this plan had no thought of creating another corporation, thus having at the same moment two of the same name and style in existence and having the same corporate powers and purposes. If such result followed from what they did it was by reason of the operation of legal rules and directly contrary to what they desired or intended; (c) Having thus provided for the debts of the company, mortgage bonds were to be issued "to provide the means to
625 complete and equip the road."

On May 12, 1875, a decree was entered in said cause in said court, afterwards amended on August 6, 1875. The decree thus amended ordered, briefly, the sale of the property of the railroad company, together with all the rights, liberties, and franchises, including the franchise to be a corporation, with all accessories thereto, and so forth, under the direction of Oliver

Fisk and Kenneth G. White, Esquires, as master commissioners; that the lands conveyed by said mortgage or deed of trust should be sold at public sale at places within the the states and territories in which they were situate to the highest and best bidder under the direction of the same master commissioners upon certain notices in the decree provided for. It was directed that Jay Cooke and Charlemagne Tower, trustees, should make conveyance contemporaneously with the conveyances directed to be made by the master commissioners of either property or lands sold and that the Northern Pacific through its receiver make like deeds to purchasers at such sale. On August 25, 1875, the commissioners reported that in accordance with the decree they had, on the 12th day of August 1875, sold the property, liberties, and franchises, including the franchise to be a corporation, and excepting only the lands that had been conveyed to the company by letters patent of the United States, or certified to or for the company by the Interior Department of the United States, as an entirety to certain persons therein named as a committee appointed under the plan of the bondholders of the first-mortgage bonds of the railroad company, adopted on June 30, 1875,
626 and in pursuance of said plan, a copy whereof was submitted to the masters and by them returned and made part of their report, for the sum of $100,000. On August 25, 1875, the sale was approved and confirmed by the court and directed that the master commissioners make deed or deeds to the purchasers. September 17, 1875, accordingly, the master commissioners executed a deed reciting the sale, the report to the court, and the order confirming the sale. This deed ran to certain named persons as a committee appointed under the plan of the holders of the first mortgage bonds of the Northern Pacific Railroad Company, adopted June 30, 1875, and in pursuance of said plan. On the 28th day of September 1875 the receiver likewise made conveyance, and on the 27th day of the same month Jay Cooke and Charlemagne Tower, as trustees under the mortgage, conveyed. Both these conveyances ran to the same named persons as the committee appointed under the plan and in carrying out the plan. On March 22, 1882, Johnston Livingston and others comprising the committee for the bondholders conveyed to the Northern Pacific Railroad Company, a corporation created by and existing under the laws of the United States, all and singular the railroad and property, the rights of property wherever and however held, situate, and being, together with all the rights, privileges, liberties, and immunities and franchises, including the franchise to be a corporation, mentioned and specified in the deed of September 17, 1875, from the master commissioners, and

in the deed of September 27, in the same years, from Jay Cooke and Charlemagne Tower, by George W. Cass, as Receiver, together with all rights, interests, claims, demands, and
627 causes of action of every nature or description acquired by or devolving upon the said commiteee through the mortgage proceedings, and the sale made in pursuance of the decree thereof, or in any other manner whatsoever. This deed recited briefly the proceedings leading up to it, and that it was made upon the advice of counsel and intended to be a further assurance.

It is further charged that in such foreclosure proceedings not any of the lands owned by the railroad company were sold at public sale at places within the States and Territories in which the lands were situate in single sections or subdivisions thereof, but that 838,852 acres were sold under collusive private sales in tracts exceeding 640 acres, without bona fide consideration, in New York City to Frederick Billings as the representative of the committee of bondholders appointed under said plan of reorganization, and the conveyances thereof were made under deeds dated December 16, 1876. This deed briefly recited the appointment of Cass as receiver by the Court in which the foreclosure proceedings were pending; recited the Act of Congress creating the railroad, the delivery to Cooke and Tower as trustees of a mortgage, the covenant in the mortgage that the railroad company might at all times, notwithstanding the mortgage, contract for the sale of any of the lands granted at prices to be approved by the trustees, and that the trustees should execute to the purchaser a release thereof. The foreclosure proceedings and sales were likewise recited and that the receiver had contracted to sell to the grantee certain portions of the granted lands which had been patented, or certified to the company in the county of
628. Cass, State of Minnesota, the several tracts or parcels in the schedule of lands attached, aggregating 214,742 acres, more or less, and it was further recited that Cooke and Tower joined in the deed as such trustees. On the same date nine other conveyances in precisely the same form by Cass as receiver and Cooke and Tower as trustees were executed running to Frederick Billings, the amount of land conveyed and the consideration expressed therefor being in the respective conveyances as follows: 84,073.68 acres, Becker County, Minnesota, for $210,184.20; 99,926.57 acres in Wadena County, Minnesota, for $249,816.83; 17,958.37 acres in Polk County, Minnesota, for $44,225.55 acres, Todd County, Minnesota, for $110,563.87; 8,266.05 acres, Morrison County, Minnesota, for $20,665.13; 21,797.31 acres in Aitkin County, Minnesota, for $54,493.28; 601.91 acres, Cass County, Territory of Dakota, for $1,504.78. It is then alleged that all

the balance of the lands belonging to the company were sold by the collusive and fictitious sale of August 12, 1875, by the commissioners and by the receiver and conveyed by the deeds which I have already stated. That these lands were sold to or for the benefit of the bondholders and stockholders of the company as reorganized under said plan, and taken over by the railroad company as reorganized and dealt with and sold by the reorganized company at such times and places and in such quantity and to such persons and at such consideration as suited its pleasure, and that thereby the company received values in excess of the prices the lands would have brought if sold under bona fide sales to third persons under the foreclosure proceedings. That the intention was not to sell any of the lands by bona fide sales to third persons but to pass all said lands to the reorganized com-
629 pany for the use and benefit of those participating in the plan, and that this intention was carried out by the aid of the court through the consent and collusive action of the parties, and the several decrees and sales and conveyances I have already recited are each referred to as having that effect. It is charged, also, that from August 12, 1875, to March 22, 1882, the reorganized company conducted its business as if the corporation created by the Act of July 2d, 1864, had ceased to exist, made disposal of its lands, stock, and bonds, constructed portions of the road and held itself out to be a corporation distinct and different from the one created by the said Act, claiming at all times, but without authority, to be operating under the federal charter granted by the Act and subject to all the rights and obligations imposed by the Act and by the Joint Resolution of May 31, 1870. That after the latter date the reorganized company held itself out to be, and conducted its business on the basis that it was the company created by the Act, and that its business was being conducted under the charter thereby granted. That subsequent to June 30, 1875, the Secretary of the Interior established land limits opposite portions of the railroad constructed by the said reorganized company, and patents and other muniments of title were issued by the administrative officers of the Government for lands within the limits in the name of the Northern Pacific Railroad Company created by the Act of July 2d, 1864; that the railroad company as reorganized, but claiming still to be the federal corporation, executed certain mortgages, some of which were foreclosed in the proceedings initi-
ated in 1893 in the Circuit Court of the United States for
630 the Eastern District of Wisconsin, as a consequence of which said foreclosure and other proceedings collateral thereto the defendant Northern Pacific Railway Company, a Wisconsin

corporation, succeeded by operation of law, or otherwise, to all rights, titles, interests, and obligations held either by the railroad company created by the Act of July 9, 1864, or the railroad company as reorganized under the plan of June 30, 1875. It is then alleged that at the time of the deed of March 22d, 1882, the corporation created by the Act of July 2d, 1864, was without officers, without assets other than its federal franchise to be a corporation, without capital stock except such as had been exchanged by the holders for the common stock of the company as reorganized, and that upon the setting up of the company as reorganized the capital stock was the stock of the reorganized company, and never came to be the stock of the federal company, and that the deed was not authorized by the stock holders and bond holders and was an unsuccessful attempt to return to and place in the hands of the federal company all rights and properties acquired by virtue of the foreclosure and the plan of reorganization. That some $15,000,000 of preferred stock was accepted by the company in exchange for some 3,000,000 acres of lands in Minnesota and Dakota east of the Missouri River, and was thereupon cancelled, and it is said that all of this was in breach of the contract with the United States because the lands so exchanged were not disposed of to raise money for the construction of the road, but in carrying out the unlawful plan of June 30, 1875, and it is again reiterated the land so exchanged should have been sold at public auction to the highest and best bidder.

631 Throughout these sections several steps and transactions charged are said to be fraudulent and collusive, in breach of the charter of the road, but I have omitted, and shall omit from my consideration of the case all these characterizations. The legal effect of this reorganization is to be determined by what was done and not by what it is called. The matter of this reorganization as presented by the Government raises two questions, first, the effect of the proceedings upon the corporate character of the Northern Pacific Railroad Company; and second, what effect it had, or should now have upon the adjustment of the land grant between the Government and the present railway company.

Several questions are raised and argued at considerable length by counsel upon the procedure just outlined. One is whether the judicial action terminating in the decree of foreclosure and consequent sale was in any correct sense of the term a foreclosure of the mortgage. If the court had jurisdiction of the subject matter of the cause, which might possibly be open for legitimate debate, but was not put forward in the arguments to me, and as unquestionably it had jurisdiction of the parties, I can see no reason to doubt that the decree arrived at had the full force of

a judgment, binding for all time upon the parties and their privies. This is true, also, of the various interlocutory orders made by the court in the course of the proceedings. It cannot be doubted, is, in fact not questioned, that a suit was begun, all procedural steps were taken and all orders made, and the final judgment rendered by consent—much of it by prearranged
632 consent. But it is fundamental that a consent judgment is just as binding upon the consenting parties and their privies as is an adversary judgment. Of course, it does not bind other persons, nor in any degree prejudice their rights, but neither, for that matter, does an adversary judgment except in certain instances not material here, such as a *a* judgment, for example, establishing status. Therefore, the United States had every right against the railroad company after the judgment it had before, and every remedy the law afforded to enforce its rights remained unimpaired.

Another view of this procedure is that the court was but a conduit through which, by private arrangement among themselves the bondholders and stockholders accomplished the result they desired. So far as this is so it is equally true of any consent litigation. Given, however, a subject matter over which the court has jurisdiction, and given parties over whom this jurisdiction extends, and who are brought in by the established processes of that court, or who may voluntarily come in and submit themselves to it, the determination made is valid and binding upon all such parties and their privies. It is, also, true, notwithstanding the binding character of the judgment that the court in another case between other parties might refuse to recognize the case as a precedent within the rule of stare decisis, but that is another doctrine.

The foregoing is so elementary that it may appear presumptuous for me to present it to this court, but so much argument has been expended on the 1875 reorganization so called, and so much importance seemingly has been attached to every step taken, that I felt I owed it to counsel to state my views
633 rather fully. But, having done so, I feel bound to say further that it does not make the slightest difference to this case which view of those court proceedings is accepted.

Another proposition much argued is that the franchise of the Northern Pacific Railroad Company to exist as a corporation could not, as a matter of law, pass by the mortgage, notwithstanding the court declared in the decree that it did pass, and that in consequence the Court had no jurisdiction to decree its sale and to direct its conveyance, and that therefore, the clauses in the deeds conveying to the bondholders' committee which undertook to convey that franchise were utterly void. Certainly

that question was open to the Government at all times, both before the decree and after. The principle that a franchise to be a corporation conferred upon a body of incorporators by legislative Act is not vendible unless and except it be so declared by the legislature in clear and unmistakable terms is fundamental. If this franchise had been made vendible by Congress at all it was by the phrase "* including its franchise as a corporation" in the Joint Resolution of May 31, 1870, authorizing the mortgage. I agree with Mr. McGowan that the phrase does not have such effect. As Mr. Lyons does not contend against that construction it is unnecessary to state the reasons for it.

I hold, therefore, that, notwithstanding the terms of the mortgage, the decree of court and everything that was done in the reorganization proceedings of 1875, the right to be and exist as a corporation conferred by the Act of July 2, 1864, constantly remained in the Northern Pacific Railroad Company as cre-
634 ated by that Act and still there continues. I hold, also, that as this franchise was derived from the United States it had a direct interest in the subject, and at all times might have enforced by appropriate procedure its authority.

Finally it is claimed that out of this reorganization arose a new concern, in this case sued sub nominee, the Northern Pacific Railroad Company as reorganized in 1875. It is described in subdivision II of the bill: "The Northern Pacific Railroad Company self-styled, which came into existence under a plan for the reorganization of the Northern Pacific Railroad Company dated June 30, 1875": but whether as a corporation, as a volunteer organization, or as what particular sort of entity, is not alleged either in this portion of the bill, or elsewhere. Mr. McGowan, generally clear and direct in statement and argument, nowhere in his discussion supplies that omission. I am left, therefore, to conjecture what sort of legal creature it is supposed to be. If it has any existence, either corporate or associative, it ought to be possible to state and define it. Again it is nowhere pointed out how, or by reason of what legal principle or combination of principles the facts charged gave it origin. If it did come into some form of existence by virtue of the facts alleged it ought to be possible to state the legal conception.

The corporate body created by the Act of July 2, 1864, has never been dissolved. Its dissolution could only be affected (a) by surrender of its franchise to the United States, and acceptance by the United States of the surrender; (b) expiration of
635 its charter and, (c) forfeiture of its franchises by Judicial decree. Of course under particular statutes and charters dissolution may occur in other ways. None of these has operation here. Admittedly the franchise has not been surrendered,

the charter has not expired by limitation and judicial dissolution has not been adjudged—is not even sought in this suit. I do not understand it to be claimed that the company has been dissolved; on the contrary, it has been made a defendant here. Its existence is presumed and on motion of the Government it has been required to answer.

The legal result of what was done is just this—and this only: the old stock was called in and retired. There was a new issue of the entire capital stock; that some of this reissue was termed preferred and some common makes not the slightest difference—it was all capital stock. The special privileges of exclusive voting right for a period, of exchangeability for granted lands of the company, and the exclusive right for a time to be paid declared dividends attempted to be conferred upon that portion of the stock termed "preferred" were unlawful and, against objection, perfectly futile. So, also, was the denial to that portion of the stock called "common" of its legal right to vote and to share in dividends. In short, the company had unlawfully endeavored to alter the legal rights of its shareholders. If they all consented that ended the matter as to them. Any stockholder could have objected, of course, and through appropriate action have made his objection effective. No one did take action and all must, therefore, be held to have consented or to have waived objection.

The United States, however, as the creator of the corpo-
635 ration, might have corrected that irregularity by mandamus, quo warranto, or other available direct procedure, or might even have procured a decree of judicial dissolution of the corporation, if the courts were of the opinion that the irregular things were sufficiently vital to justify such a decree. But the Government did not do so. On the contrary, it acquiesced for some sixty years in all that had been done. Not only did it acquiesce but for all of those years affirmatively recognized through all its branches—legislative, executive, and judicial—the Northern Pacific Railroad Company as validly existing under the charter granted to it by Congress and as, in valid exercise of its franchise, building, equipping, and operating the railroad it was created to build and entitled to receive the lands granted to it and which were being patented to it or certified for patent as each successive twenty-five-mile section was finished and accepted.

There is no reason to suppose that this concerted action resulted from inattention. It is impossible to believe that any department of the Government having to administer the land grant could have been ignorant of what had been done in the reorganization. There is no need to resort to inference, however, for it affirmatively appears the Government did have direct and detailed knowledge. By the Act of June 25, 1868, annual reports

were required to be made by the Company to the Secretary of the Interior; by Act of June 19, 1878, to the Auditor of Railroad Accounts—in the appropriation Act of March 3, 1891, the name of this office was changed to Commissioner of Railroads.

637 In the report made to the Secretary for the year ending June 30, 1875 (N. P. Exhibit 39), it is stated that a receiver was appointed on the 16th day of April of that year; that the mortgage authorized by Congress was foreclosed by decree of the court, and that on subsequent orders all the company's property and rights of property, including its franchise as a corporation, excepting only its patented and certified lands, were sold in New York City on August 12, 1875, to a committee acting for the bondholders. It is also said that the corporation as then existing will have $51,000,000 of preferred stock and $49,000,000 of common stock, making the $100,000,000 authorized by the Act of incorporation, and that under the plan of reorganization the bondholders will surrender these bonds and receive preferred stock, and the stockholders will become common-stock holders. A similar report was made in 1876 (N. P. Exhibit 40), and in 1877 (N. P. Exhibit 41); and in 1879 (N. P. Exhibit 42). In the report to the Secretary of the Interior for 1877, Part 1, page XXVI, the reorganization is described, and in a debate the United States Senate on April 22, 1878, Senator Windom detailed the proceedings rather fully. The Commissioner of Railroads reported to the Secretary of the Interior, the Secretary to the President, and the President in his annual report to Congress transmitted the reports of the Cabinet members. These are printed as executive documents. In the report of the Commissioner of Railroads for 1881, page 183, there is a rather complete statement of the reorganization. In the annual report of the Commissioner for 1882, at Table No. 1, page 244, the statement appears that the Northern Pacific Railroad Company was

638 "reorganized September 29, 1875, by the bondholders, after purchase at foreclosure sale August 12, 1875". The facts were stated with more or less completeness in other reports but it is not necessary to refer to them. At a later time in 1897 the facts were brought home to the Attorney General by various communications from counsel of the railroad company. On January 29, 1897, the Secretary of the Interior asked the Attorney General for an opinion, and in reply Attorney General Harmon wrote the opinion of date February 6, 1895, reported in Vol. 21, Opinions of Attorneys General, page 486. In November and again in December 1899 the Secretary of the Interior in decisions prepared by Assistant Attorney General Van Devanter (now Mr. Justice Van Devanter) and reported in 29 L. D., pages 316 and 387, respectively, held that the Northern Pacific Railway

Company was the successor in interest of the Northern Pacific Railroad Company. It was stated that complete proof of such successorship had been filed by the railroad company. These proofs included the papers relative to the 1875 foreclosure.

By a communication to the Secretary of the Interior of date September 16, 1904, Mr. Joseph P. McCullen, of Philadelphia, counsel in suit brought and then pending by certain minority stockholders of the railroad company against the railway company (N. P. Exhibit 44), commenting on the opinion of Attorney General Harmon, said the assumption was erroneous that the mortgages foreclosed by the 1896 foreclosure proceedings had been executed by the Federal, a corporation known as the Northern Pacific Railroad Company, whereas after the foreclosure proceedings and reorganization of 1875 the new company had
639 been organized, calling itself the Northern Pacific Railroad Company, but not incorporated by Congress, and the land grant was not conferred upon it, and it always had claimed to be separate and distinct from the Federal corporation. After extended comments and reference to cases, and considerable discussion, Attorney General Moody, under date of April 12, 1905 (25 OP, Atty. Gen. 401), rendered an opinion referring to the 1875 foreclosure proceedings, and confirming the opinion of Attorney General Harmon.

Subsequent to the reorganization of 1875 several bills were introduced in Congress, providing, among other things, that a Federal franchise be conferred upon the railroad company as reorganized (Government Exhibits 50 to 54, inc.). It provided, also, in each of these bills, to extend the time to complete the road. None of these bills passed. However, they do show that Congress had direct and specific information about the reorganization proceedings.

Even after all these years and the changed conditions that have intervened, it is not difficult for one who has lived a greater part of his professional life in that portion of this country described by Mr. Justice Van Devanter as "great stretches of homeless prairies, trackless forests, and unexplored mountains," to see clearly why the Government pursued the course it did. As already related, the country was in the grip of one of the most disastrous periods of its history. The Northern Pacific Enterprise was at a standstill—was, indeed, to all appearances irretrievably ruined. Unless the company could devise some method to pay its debts, and to hold onto the 500 odd
640 miles of road then completed, and to preserve the lands then earned until normal times might return, it was a practical certainty the project was forever at an end. There could have been no reasonable hope, either, that another com-

pany would take up the discredited enterprise, at least, until some future generation, even if Congress could have been persuaded to renew to it the land grant. That was at best more than doubtful. Then, too, as already stated, thousands of small investors, scattered throughout the length and breadth of the land, bought the bonds of the company and stood to lose the investment, which they could ill afford to do, especially in those dark days. If by some such irregular procedure as proposed by the plan of reorganization the enterprise could be saved, and in a few years carried forward to a successful termination; if by such means these bondholders could recover their money, why should the Government interfere? How was the Government thereby injured, or the people of the United States, or for that matter, how could any human being conceivably have been wronged by it? The only persons having any possible interest to object were satisfied. Why should any person else have objected?

It is not either right or expedient for the Government or individuals at all times to insist upon their strict legal rights. Very frequently wrong and injustice are thereby wrought without any compensating advantage to the one insisting. On the other hand, by waiving form or even some portion of the substance good results to everyone concerned. I think it is so here.

In exactly eight years thereafter the road was built, and
641 has ever since been operated with all advantages resulting, not only to the Government as such, but to all the people of the nation. In exactly fifteen years from the reorganization four great states were admitted to the Union, and men from all of them entered into high places in this Government, achieving distinction.

It is urged, however, that by the bills introduced in Congress already mentioned, it is made evident that the company did not think its position was safe under the reorganization. That is probably so. These proceedings, as we have already shown, were vulnerable to attack, and doubtless it desired the security of express legislation. We can all see now that it would have been better so. It is argued, too, that by the refusal to pass some such legislation the purpose of Congress not to waive irregularities was plainly declared. I do not think so. Every lawyer of experience knows that one having a right which he has no intention of enforcing, but every intention of waiving, will frequently, generally, in deed, refuse to execute an express waiver, while so acting as to make beyond legal quibble, an implied waiver. There is something in human nature that derives satisfaction from the sense of power this gives—the right to see it, as he supposes, that the other party thereafter shall live up to the letter and spirit of his undertaking, and with the subconscious thought,

perhaps, that at some time he may change his mind. Congress at times apparently proceeded in much the same fashion. In this matter it may very well have intended not to interfere, but to have been unwilling irrevocably to say so. It may have thought that if the company did extricate itself from its besetting difficulties, and did successfully go forward with the enter-
642 prise, it would continue to acquiesce; but that on the other hand, if the great and difficult undertaking ahead could not be carried through, Congress wished to be in a position to enforce the rights of the Government. That would have been a sound position to take, and Congress acted throughout as if such had been its purpose.

The foregoing considerations aside, it seems to me perfectly clear that the Northern Pacific Railroad created by the Act of July 2, 1864, not only continued to exist with its franchises and powers unimpaired by the reorganization, but that in fact it and no other company or agency whatever did thereafter build the road it was created to build, and did in this corporate capacity earn and receive its land grant. Certainly the purchasing committee, the bondholders, and the stockholders so understood and so proceeded.

Under date of August 27, 1875, a call went out signed by the bondholders' committee, attested by the Secretary of the Northern Pacific Railroad Company, and others of the bondholders of this company. It was recited that on the 12th inst. the committee had purchased at judicial sale all the property of the railroad company except its patented and certified lands, together with all its rights and franchises, including that of being a corporation. It said that thereby that committee became the body politic and corporate known as the Northern Pacific Railroad Company, and in that name they and their associates would be clothed with all the rights, liberties, and franchises of said corporation. Therefore, all who had come in under the plan were notified to meet at the office of the company on the 29th of Septem-
643 ber 1875 to elect a board of directors and that as formal certificates of preferred stock had not been issued all holders of receipts from the trust company for surrendered bonds would be entitled to vote and that holders of common stock had not the right to vote until after July 1st, 1878. The committee made a report to the stockholders, addressed to the stockholders of the Northern Pacific Railroad Company, in which it reported the proceedings and congratulated the stockholders upon the fact that they had five hundred and fifty miles of road in operation, free from debt, and an attaching domain of nearly ten million acres of land. With this immense extent of unencumbered prop-

erty as a basis for future operations, and the twenty-five thousand-and-odd acres to be added for every mile of new road built, there ought to be little doubt of their ability to secure means for the early resumption of work in the extension and completion of the road. The report of the committee was accepted and placed on file. By-laws were adopted. The action of the purchasing committee was approved, and the board of directors of the Northern Pacific Railroad Company was elected (Plaintiff's Exhibit F). A certificate of preferred stock and one of common stock is in evidence as exhibits on motion to strike the service on the so-called reorganized road. Both of those certificates recite that they are issued by the Northern Pacific Railroad Company, a corporation organized under the Act of July 2, 1864, and in accordance with the plan adopted at the bondholders meeting of June 30, 1875. On the first day of May 1879 the Missouri Division mortgage was executed by the Northern Pacific Railroad Company, describing itself as a corporation existing under the Act of
644 Congress, entitled "An Act, etc." approved July 2, 1864, and reciting the several provisions of the Act of 1864, and of the Joint Resolution of May 31, 1870. The mortgage covered that portion of the main line of the railroad known as the Missouri Division, and describing the point from which to which it was to be built, including everything on that division, together with the lands situate and definitely located as appertaining to and to be earned by the building of this division. Forms of the bonds are set out in the mortgage, the company describing itself again as the Federal Company and, amongst other things, providing that it and its accrued interest would be accepted at par in payment for lands acquired by the construction of this division. This conclusion is not at all affected by any vagaries of opinion expressed by successive officials of the company, nor by the shifting positions taken by the various counsel of the company in cases between it and third persons which have been brought to my attention. As between the United States and this company these cases have no possible bearing.

I entertain no doubt either that as a matter of law it was the company created by the Act of Congress and that what it did as a matter of fact after the reorganization was, as a matter of law, done by it in its said corporate capacity and none other. The reconstruction neither dissolved the old company nor created a new one. Notwithstanding the gross irregularities of this reorganization, after it was all over and done with the Northern Pacific Railroad Company remained with the right and power in it and in it alone, to perform the work it was created to do,
645 and take and hold the land that had been granted to it. This being so it must of necessity follow as a deduction of

law that it, and it alone, possessed the franchise to build, and it, and it alone, had the corporate capacity to receive the land granted, and when it did build and when it did receive the lands I think the question was for all times ended. It is, however, argued with great force and persuasion by Mr. McGowan that this cannot be so because the bondholders' committee had received by the several deeds to it everything that the Northern Pacific Railroad Company had or ever had had except the franchise to be a corporation, and retained the same until the deed of March 22, 1882, and that even that deed was ineffectual because the railroad company created by Congress had no officers or agents who could accept the deed. But I cannot adopt this conclusion. All the conveyances made to the committee by which they got their title were made to them in expressed terms as a committee of bondholders under the plan of reorganization. The committee never claimed to have title in any other capacity. By the very terms of that plan the committee were to purchase for the benefit of all parties complying with the plan. It is obvious, therefore, that they took title in trust. Nothing but the bare, legal title ever passed to them. The beneficial interest remained elsewhere. They held in trust, first, to cause preferred stock to be issued to the bondholders in exchange for their bonds; second, to cause common stock to be issued to the stockholders in exchange for the common stock previously held by them; third, to assume the management of the company, and after causing the issuance of the stock and bonds contemplated, to place the railroad
646 and property again under the control of a board of directors to be elected by the preferred-stock holders. I think the plain construction of that language, the plain intent of the plan and the plain purpose and effect of what they did do thereafter was that the beneficial interest in the property at all times continued to remain in the Northern Pacific Railroad Company, and the naked title only in the committee. The beneficial interest certainly did not pass to the committee and it must have remained somewhere. It was not in the bondholders thereafter to become the preferred-stock holders. If it was elsewhere except in the railroad company itself it was in the common-stock holders thereafter to become stockholders under the plan. Neither the bondholders nor the stockholders of the railroad company had any interest in creating a new corporation. The value of preferred stock which the bondholders took in exchange for their bonds entirely upon the old company continuing with its land grant and its road already built and so likewise did the value of the common stock under the plan which the old-stock holders were to take. I do not think the deed of March 22, 1882, changes the situation in the slightest. Not only is it declared as a deed of

further assurance, but it evidently was given because of doubts and questions raised as to the title. If, however, it was of any consequence and, if it otherwise did convey any title of value, the objection that there were no officers to accept it is quite unavailing. I think, in the first place, all officers accepted; the officers who had issued the stock under the plan, the officers who had executed the Missouri Division mortgage were officers of
647 of the company; but if it were otherwise, then the old officers of the company still continued and could accept. But whether there were any officers who could accept or not is quite immaterial because of the fundamental principle that where a deed of conveyance runs to a person, which it is to his manifest advantage to accept, in the absence of proof he will be deemed to have accepted it and when acting under it it is not necessary to show acceptance.

I hold, therefore, in conclusion as to all these subdivisions first, that the demurrer should be sustained to each and every of them; second, that the plea of acquiescence and waiver should be sustained and, third, the motion of the defendants railway company and improvement Company to quash return of service on the railroad company as reorganized in 1875 should be sustained because I think there is no such concern in existence and never was and, hence, there was nobody who could be sued and of course nobody could be served. I have not discussed the supposed effect of these proceedings upon the land grant under the terms of the Joint Resolution of May 31, 1870. I reserve discussion of that until I reach the foreclosure proceedings of 1893–96. I remark, however, that as indicated by my ruling above I shall hold that the Government has no cause of complaint in that behalf.

648 VIII

PORTAGE, WINNEBAGO & LAKE SUPERIOR GRANTS

Subdivision XXII of the bill relates to the Portage, Winnebago & Lake Superior grant, the precise question being whether by reason of that grant some 370,000 acres should be deducted under the first proviso of Section 3 of the Act of July 2d, 1864.

The alleged facts are that Congress by Act of May 5, 1864, granted lands to the State of Wisconsin to aid in the construction of a railroad from Portage in that State to Bayfield, and thence to Superior. The benefit of that grant was extended by the State to the Portage Railroad Company and that company on November 10, 1869, filed with the Interior Department a map of definite location of the entire authorized line. Defendants' Ex-

hibit No. 91 shows the located route and the portions constructed. As located the line ran northerly from Portage through Ashland to Bayfield and thence in a general westerly course, but bearing somewhat northerly, to Superior. The portion of the road actually constructed, shown on the exhibit by solid line, extends from Portage by way of Stevens Point to Ashland, and the grant appertaining thereto was earned; but the road from Ashland to Bayfield, and from that point to Superior was not built and the grant appertaining to this portion of the line was forfeited by the Act of September 29, 1890.

On July 5, 1882, and on November 20, 1884, the Northern Pacific Railroad Company filed with the Interior Department maps of definite location covering that portion of its railroad to
649 be constructed between Ashland and Superior, and the road was thereafter built substantially on that line. This portion of the Northern Pacific Railroad is said to be on the same general line as the located but not constructed portion of the road of the Portage company between Bayfield and Superior, and thus fall within the terms of the first proviso of Section 3. It will be observed that the two lines form a triangle, the base being the line between Ashland and Bayfield, said to be about fifteen miles, and the converging lines meeting near Superior constituting the apex. The lands in place within the overlapping limits of the two grants were concededly granted and reserved within the terms of Section 3 at the date the Northern Pacific definitely located this portion of its route, and in consequence did not pass by the grant. The Secretary of the Interior treated them as lands lost to the grant and permitted the selection of indemnity lands on this basis. But if within the meaning of the proviso the two routes for the distance in dispute were upon the same general lines no lands were granted to the Northern Pacific Company for that part of its road, hence nothing was lost to its grant and there was no basis for such indemnity selections. It is argued first, rather faint-heartedly, it seems to me, that the incidental paralleling for so short a distance of two lines not having a common terminus at either end, and the general course of which are at right angles, does not come either within the language or the purpose of the Statute. I hold against this contention for the reasons stated in discussing further argument, to which I will now refer.

It is further contended that the words of the proviso "railroad route"—plainly mean the route of a railroad and not
650 of a railroad location. That it could well have been conceived by Congress a possibility of conflict might arise with a projected or located road which upon actual construction

might be found upon another route wholly or in large part different from its located line, and it is emphasized that the language used evidences clearly that Congress had in mind only conflicts between grants actually earned. And it is further said that Congress by this proviso manifestly intended that two grants should not be made in aid of two roads, each of which should serve the same purpose, but by the same token Congress did not intend that aid should be denied to the road which was built because if another had been built it would have received aid. The argument is persuasive and is of course attractively put, but is not quite convincing. It may be that the phrase "railroad route" might ordinarily be the equivalent of "route of a railroad"—an actual road—but in various connections it might as well mean the route of the projected or authorized line. To determine the sense in which the phrase is used here the connection and certain other facts must be considered.

Quite frequently in the Northern Pacific, and other railroad, legislation, the term "railroad route" or "railroad line", or other equivalent terms, is used as meaning either the line of the road as actually built, or the line as located, or sometimes as contemplated, and in the very proviso in question it is said if said route, namely
the route of the Northern Pacific, is found upon the line of
651 any other railroad route, and so forth. Plainly the terms "said route" and "any other railroad route" refer to one and the same thing, namely, the route as definitely located, and when the second proviso further authorized the company receiving the previous grant to assign their interest to the Northern Pacific, it means their interest in the land granted upon its located line. It manifestly does not mean exclusively upon its constructed line. Moreover, the Portage granting Act was passed by Congress just sixty days before the Northern Pacific Act, and I cannot but think the presumption is obvious that Congress when it passed the latter had in mind the former. By the Northern Pacific Act it is to be remembered that the Company was authorized to fix its Eastern terminus at a point on Lake Superior in the State of Wisconsin, to be determined by it and Congress must have anticipated that this point might be so fixed as would, of necessity, make a railroad westerly from that point run on the same general route as that of the Portage line. I think, therefore, that the phrase "railroad route" ought to be construed as meaning the route either constructed or definitely located. This reasoning is strengthened further by the fact that the Northern Pacific Company was required to commence work within two years after the passage of the Act, and, of course, should have located its route and filed it in the Interior Department before work was commenced, as it, in fact, did. Within

that time it could not have been contemplated that the Portage road would have been built, and the most that could have been expected was the definite location of its route; but when the Portage road should have definitely located its route, and
652 when the Northern Pacific should have definitely located its route, the rights of the two companies in the grant would have been thereupon fixed. The grant to the Portage Company as to the Northern Pacific was one in praesenti but upon the condition subsequent that the road be actually constructed. The title passed by reaction to the time of the grant whenever the route should be definitely located, and it remained in the Portage Company at all times until forfeiture for failure of the condition. If Congress chose not to forfeit for that reason, then the title of the Portage Company would be perfect. Its title, however, was perfect subject only to loss by forfeiture. I do not see, then, how it can be said that any title within the overlapping of these two roads ever passed to the Northern Pacific. It was out of the Government and vested in the Portage road, and there it remained until the title was forfeited in 1890.

But if the proposition may be thought doubtful, or even fairly debatable, I think the rule of strict construction, as I have already declared, applies. It goes to the measurement of the grant. If the position of the railroad company were sustained then its grant would be some 370,000 acres more than if that position were overruled. In United States vs. Oregon &c. Railroad, 164 U. S., 569, it is said: "The rule of construction applicable to the granting Act is the familiar rule that all grants of this description must be construed favorably to the Government, and that nothing passes but what is conveyed in clear and explicit language." And it is added "* * that the construction should be such as will effectuate the legislative intention, avoiding, if
653 possible, an unjust or absurd conclusion, is also well settled." In Sioux City & St. Paul Railroad v. United States, 159 U. S. 349, 360, it is said by Mr. Justice Harlan, speaking for the court, "if the terms of an Act of Congress granting public lands, 'admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor. And if rights claimed under the Government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them." In Leavenworth &c. R. R. v. United States, 92 U. S. 733, 740, it is said "Acts of this character must receive such construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance." In Winona & St. Paul Railroad v. Barney, 113 U. S. 618, 625, the court has

said that statutes should receive a sensible construction such as will effectuate the legislative intention and avoid as far as possible an unjust or absurd conclusion. Giving effect to these rules of statutory interpretation I cannot but suppose that the language here in question should be construed as covering not only a case where the prior granted road had been actually built but also where it had been definitely located.

But at this point it is pressed upon me that the construction given to the Act by the Interior Department is as contended for by the defendants and that under familiar rules, unless the construction under which that department has administered the grant is clearly wrong, it ought not to be departed from, and the language used by Mr. Secretary of the Interior, Hoke
654 Smith, in a case reported in XXI L. D. 412, too, is quoted as clearly declaring the rule applied by the department. In that case the question of the construction of this proviso was not before the Secretary, was not ruled upon by him, but was used in a merely introductory manner, and, as stated in the opinion itself, "as part of the history of the time, having relation more or less to, and somewhat explanatory of, the subsequent Acts and presented claims of the Northern Pacific Railroad Company." The question before the Secretary in that case was whether the Eastern Terminus of the Northern Pacific Railroad was at Ashland in the State of Wisconsin, or at Duluth in the State of Minnesota. That was the only question he discussed, and was the only question he decided, and in a very lucid and able opinion he reached the conclusion that the eastern terminus was Duluth. This opinion was communicated to the Commissioner of the General Land Office on November 13, 1895. The Eastern Terminus case, 177 U. S. 435, was decided April 16, 1900, and determined that the eastern terminus was, in fact, at Ashand, and not Duluth. Thus, any authority to be derived from the opinion of the Secretary of the Interior in XXI L. D. is destroyed. However, it is alleged by the bill that the grant was, in fact, administered as the Secretary in the cited case declared it should be, and from that the argument proceeds that whatever authority the former opinion rendered by the Secretary may now be, the practice is established, is definite and is uniform. I do not understand either from the pleadings or from the argument of counsel that the practice had been established in respect of any other railroad grant. If so, at least no instance is
655 cited to me, and I have observed none in the reports. Therefore it must be conceded that the established practice counsel appeals to means merely that the department did, in fact, administer this grant in that way, and this grant only. I cannot think that this of itself is sufficient to bring the case within the

rule of following the construction of the department, but, anyhow, I am of the opinion that the rule applied by the Government in administering the grant in relation to that case was so clearly wrong that it ought not to be followed, hence, I hold that the demurrer should be overruled.

The case of United States vs. Northern Pacific Railroad, and others, in United States Circuit Court for the District of Washington, Western Division (N. P. Exhibit 23), is pleaded as res judicata against this subdivision. I have already expressed the opinion that this and other cases pleaded as previous adjudication cannot be held to bar the action; that they are evidential only and should be offered and considered at the hearing on the merits. As your Honor may take a different view, however, I shall here state my view on that plea as applied to this subdivision. In that case the Secretary of the Interior was adjusting the Northern Pacific grant under the provisions of the Act of March 3, 1887, and subsequent Acts. In the course of that adjustment he had reached the conclusion that the land involved in the pleaded case had been unlawfully conveyed to the railroad company, and thereupon by authority of the Act he required the Attorney General to commence suit to recover it. The Court held that it was neither alleged or proven that the company had received its full measure of the grant or that there were sufficient other lands within either place or indemnity limits to satisfy that measure, and that, therefore, it could not be determined whether as a matter of fact the United States lost anything or the railroad gained anything by reason of the erroneous patenting of that tract, and upon the authority of United States v. Winona & St. Paul Railroad Company, 165 U. S. 465, Judge Donworth dismissed the bill. If that case had been brought when the adjustment of the grant by the Secretary had been completed, and it had appeared by that adjustment that the company had received its full measure without the particular tract involved, or that there were other lands within either place, or indemnity limits out of which the grant so far as unsatisfied might be gratified, then, of course, the doctrine of the Winona case would not have governed, and Judge Donworth would have decided otherwise. But as already stated, I hold that one of the purposes of this suit, perhaps its principal legal purpose, is that the land grant may be adjusted by this court in this case. It is obvious, therefore, that until the grant has been adjusted the facts required by the pleaded case can neither be alleged or proven for the simple reason that the status of the grant is not known. I attach no importance whatever to the allegations in the bill that the lands already received by the railroad more than satisfy the grant. I hold, therefore, that this plea should be

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overruled. I do not wish counsel to misunderstand this ruling, for I am not undertaking to determine what disposition should be made of the subject matter of this subdivision on final hearing, nor what effect it may ultimately have when all the facts
657 pertinent to the question of adjustment are in. All those questions I prefer to consider when they arise. I hold, simply, in ruling both upon the demurrer and upon the plea of res judicata that no lands were granted to the Northern Pacific Railroad Company by the Act of July 2d, 1864, appertaining to that portion of its line between Ashland and Superior, and that therefore nothing was lost to its grant and it cannot select indemnity lands on the basis of the lands comprehended within the territory where the place limits would have been had the grant been made, and that, therefore, the patenting of those lands to the railroad by the Interior Department was erroneous. I hold further that notwithstanding that fact, it may be that upon the final adjustment of the grant the company may have a right to retain the lands, or it may be, on the other hand, that it must reconvey them to the Government, or if they have passed beyond its control, compensate the Government in money therefor. But I must again emphasize that I cannot now determine, and do not undertake to determine, anything about what may eventuate in the final hearing. I am determining the question only as now presented.

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IX

VARIOUS ADMINISTRATIVE ERRORS

1. Portland One Mile Error—Subdivision XXIII treats of the Portland one mile error which arose out of the fact that although the company did not build approximately one mile of *of* line at Portland shown on its map of definite location, the land department patented lands to it on the assumption this mile of road had been constructed. The defendant in its answer admits the error, and that there should be deducted from the measure of its grant in consequence thereof 11,424.48 acres. But it alleges the Government is not seeking a correction in the measurement of the grant, but is seeking to recover lands or their value and pleads various facts going in answer to that effort. I think that is all quite immaterial here. Admittedly the error exists. Admittedly it goes in reduction of the measurement of the grant. I think, therefore, the subdivision should be retained in the bill solely for that purpose. What the ultimate effect will be can only be determined when the grant is finally adjusted. All other questions raised by the answer and by the motion to dismiss touching

this subdivision I think should be overruled. I do not think it matters in the least what the government is praying for in respect of this error. The error is alleged and is admitted, and it will be applied in the final adjustment of the grant as, under the law, it ought to be applied, whatever may be the views expressed in the prayer of the bill as to the result of this error.

I certainly do not wish to be misunderstood here. I think
659 the case stands as though it were admitted of record that an error had occurred to the extent of this acreage in the measurement of the grant, and therefore in this case that error ought to be corrected. That is the full extent of my ruling at the present time and I may add it ought to be satisfactory to both parties.

2. Ainsworth Terminal Error.—Subdivision XXIV relates to the Ainsworth Terminal error. The error is admitted although there is a disagreement as to the extent of it. To whatever extent, however, there was an error, it goes to the measurement of the grant and is determinable by the identical considerations I have expressed in treating the Portland one mile error. My ruling, therefore, is the same.

3. Montana Lateral Limits Error.—Subdivision XXV of the bill relates to the error in fixing lateral limits of the grant in the states of Montana and Idaho, and that in this error is involved some 145,000 acres of land. The error is admitted by the defendant. It goes as the preceding two subdivisions do, to the measurement of the grant and of course will be taken into consideration in the final adjustment of the grant, but for the reasons already stated this subdivision is retained solely for the purpose of keeping in the record the alleged and admitted fact of the error and the ruling on the motion to dismiss will, for that reason, and that reason only, be denied.

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X

CIRCUITOUS ROUTE THROUGH WASHINGTON

Briefly, but sufficiently stated. it is alleged in subdivision XXVI, of the bill that by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, the railroad company was obligated to construct a main line of road from its eastern terminus on Lake Superior by the most direct and practicable route without unnecessary deviation to some point on Puget Sound via the valley of the Columbia River to Portland, and thence northerly, with a branch line taking off at some convenient point on its main line across the Cascade Mountains to the Sound. That the company filed with the Secretary of the Interior on July 30,

1870, a general route map from its proposed Eastern terminus entering the Territory of Washington at its southeast corner and extending thence westerly to the mouth of the Walla Walla River, and at the same time filed another general route map extending the line down the Columbia to Portland, and thence north to Puget Sound. That on February 16, 1872, it filed with the Secretary of the Interior an amended map of general route extending from the Red River in Dakota entering the Territory of Washington at a point northeast of Spokane Falls and thence southwesterly to the mouth of the Walla Walla River where it joined with the route of the map of July 30, 1870. That on October 4, 1880, the company filed with the Secretary a map of definite location of its line between Spokane Falls and Wallula at the mouth of the Walla Walla River, and that it afterwards constructed its line on this location. This map was ap-
661 proved by the Secretary on the date of its filing. It is then alleged that these several maps of general and definite route, together with the terms of the governing Acts of Congress informed the Secretary that the company's main line was to go down the Columbia to Portland and as the location from Spokane to Wallula was direct for that line the Secretary approved it on that supposition, as otherwise he would have been without authority to do, and would not have done. It eventuated, however, that the line to Portland was not built, nor was any map of definite location filed, with the consequence that the line was abandoned and the right to build was forfeited by Congress. But the company did build a line from a point near Wallula to Puget Sound via the Yakima valley, and has always operated this as its main line. It is then said that the Secretary's approval of the map of October 4, 1880, having been made diverso intuitu could not and did not bind the United States. Thereupon it is charged that the route as located and constructed between Lind and Ellensburg was unnecessarily and, therefore, illegally circuitous; that at the time of location and for years afterwards a direct and practicable route was open to the company between these towns and should have been selected by it. The present Milwaukee line is proposed by the pleader as such a route. It is then pleaded that the acreage comprehended within the place limits of such proposed route would have been 1,400,000 less than the acreage embraced within the limits of the grant as the road was actually constructed. That through the error and mistake of the officers of the Interior Department the grant has always been admeasured upon the basis of the road as built and
662 thereby the grant has been unlawfully enlarged by the quantity of 1,400,000 acres too much. The defendants, in their answer, aver the appointment of the commissioners by the

president to examine the line between Spokane and Wallula and its acceptance November 17, 1881, by him; alleges the filing with the Secretary and his approval of successive maps of definite location, first, of June 29, 1883, and the last of December 1884, of the line from Wallula to Puget Sound; alleges the construction of the road on the line of these maps, the appointment of commissioners to examine the successive sections as completed and the acceptance thereof by the President, the last of date June 13, 1887. They plead as estoppel against the plaintiff to claim that measure of the grant could be fixed by any line other than that on which the road was constructed, the case of United States vs. Northern Pacific Railway Company, 256 U. S., 51. They plead as estoppel against complaint of the location of the branch line from Pasco to Tacoma the decision of the Supreme Court in the case of Northern Pacific Railway Company vs. DeLacey, 174 U. S., 622; and another case, which is not necessary to be referred to. They further plead that the United States is estopped to question the location of this line for the reason that in 1885 while the line was under construction it made a treaty with the Yakima Indians for a conveyance by these Indians to the Railroad company of a right-of-way and station grounds of the road through their reservation upon the payment by the railroad company to the Indians of $8,295.80. That on March 3, 1893, this treaty was approved by Congress and being thereto required by the Government the company did pay the Yakima Indians for the portion of right-of-way passing through their reservation. Estoppel is further alleged in that all
663 the facts relating to the location and construction made a subject of complaint in subdivision XXVI of the bill have been known to the plaintiff for more than forty years and never prior to the institution of this suit has any complaint been made; that during all this time the United States has accepted the benefits of the construction and operation of the lines and has accepted from the company reduced rates for the transportation of its mails, troops, and supplies. The answer also demurs to the subdivision. The plea, grounded on the Forest Reservation case (256 U. S. 51) should be overruled. It is clear to me that the measure of the grant as defined by the Court in that case could not be enlarged by the unauthorized and unlawful selection of any unnecessarily circuitous route. The plea of estoppel by the DeLacey case, 174 U. S., 622, should likewise be overruled. The decision in that case would have been the same had the suggested route of the Milwaukee line been built on. The unnecessarily circuitous route by Wallula was not involved in the case and could not, therefore, have been adjudicated. The plea of estopped by reason of the Yakima Indian transaction, and by

reason of the years of recognition of the line by the Government should be sustained upon the principle of acquiescence and waiver which I have discussed in another connection, and which need not therefore be repeated here. If my views as expressed there were sound it is plain that they govern here. But the ultimate question in this subdivision arises upon demurrer and is whether the subdivision standing alone, or aided by other portions of the bill, states a case that will affect the adjustment of the grant; for it is at once obvious that the bill
664 seeks no other relief in respect of the road through this state. The determination of that question depends not only on the facts pleaded in the subdivision itself, but as well upon facts alleged in other portions of the bill, if any, pertinent to the subject together with such additional qualifying or explanatory facts as the court knows judicially, and which therefore must be deemed to be included in the pleading. By the first section of the Act of July 2, 1864, the company was empowered to construct a continuous railroad and telegraph line from a point on Lake Superior "westerly by the most eligible railroad route as shall be determined by said company within the territory of the United States north of the forty-fifth degree of latitude to some point on Puget Sound with a branch via the valley of the Columbia to a point at or near Portland." Otherwise the selection of the route was committed to the determination of the company. The geography of the country through which the road was to run was, of course, known to Congress, and the principal topographical features such as the main mountain ranges, and at least the larger rivers and their general courses and Congress legislated upon the further known fact that a practicable route could be found between the forty-fifth parallel and the northern boundary. But what practicable route was most eligible Congress did not know and did not reserve to itself or to any officer of the Government the power to determine. There was no provision for either the Commissioner of the General Land office of the Secretary of the Interior to approve or disapprove the general route or definite route selected by the company. By section 3, however, the lands in
665 place passing by the grant are determined as of the time the line is definitely fixed and a plat thereof filed in the land office and selections of the indemnity lands are required to be under direction of the Secretary of the Interior. These provisions, while not expressly requiring, seem to contemplate the filing of maps of both general route and definite location, and this the company did. The Secretary, however, has always claimed the authority to approve or disapprove any such filed maps, and so far as the general or definite locations here involved

are concerned has always formally approved them with the single exception of the general route map filed by Josiah Perham, March 6, 1865, upon which he took no action. Such formal approval seems to be proper, however, as a final administrative measure for, as another step, lands were withdrawn from sale and as already noticed under direction of the Secretary lieu land selections were to be made. By withdrawing the lands from sale as the line was definitely located and by issuing patents or certifying as earned lands coterminus with the 25-mile selection of completed railroad, and by approving lieu land selections from time to time the Secretary of the Interior exerted the only authority conferred upon him. The formal approval of the maps added no further force to his action. All these things it is averred he did, and it seems fairly apparent that thereby he had exercised all the discretion committed by Congress to him. I understand the law to be that the route must be considered as definitely located when the map of definite location was filed by the company with the Secretary of the Interior, but when this was done no further action was required by the com-
666 pany or the Secretary for that matter, to establish the route. It then becomes the duty of the Secretary of the Interior to withdraw the land from the market, but if he should neglect this duty, his neglect would not impair the rights of the company, however much trouble and difficulty might be thereby entailed. I think this is the doctrine of Van Wyck v. Knevals, 106 U. S. 361. Congress could not have contemplated that the Secretary was to supervise to any considerable extent the location of the railroad route, or to determine which of several possible ones might be the most eligible. Not only is there in the Act no direction expressed or implied to do so, but no means were provided for him either in the Act of 1864 or in any general legislation. The task was to locate and build two thousand miles of railroad through "great stretches of homeless prairies, track less forests, and unexplored mountains" in a limited time. The purposes were thereby to furnish transportation to the troops and mails and supplies of the United States Government, and to open up for settlement all that vast expanse of waste lands and build cities and towns; to establish farmsteads, to organize local government, and finally to bring into the Union sovereign states to take their place with the other states so that a government by nation, state, and locality might reach from ocean to ocean. Quite obviously to this end the pioneer road should seek a route not only "most eligible" from an engineering standpoint, but likewise a route which should reach valleys, forests and rivers "most eligible" for settlement and development. To decide upon such a route would require detailed exploration, expensive

667 primary and corrected surveys, and after a general route should have been tentatively adopted, a carefully worked out definite location in successive sections, or in railroad phraseology, divisions. Topographical features, soil and climate conditions, mountain passes and courses of rivers, large and small, had all to be studied before any sort of reliable opinion could be reached as to where the most eligible railroad route was to be found. In this the interest of the company and the interest of the government were the same. The purposes of the Act of Congress wisely carried out would yield the quickest and the greatest returns to the company, and this is why principally the Act of July 2, 1864, left it to the company to determine the route.

It was, doubtless, intended by the statesmen of that day that the Northern Pacific Railroad should serve as a pioneer into the northwest—a sort of railroad pathfinder; that local lines and branches would be built as needed—some may even have thought of the possibility that sometimes other transcontinental lines might reach the waters of the north Pacific Ocean, but I doubt if the most hopeful dreamed that within a few years two other great railroad lines would traverse these homeless prairies and tunnel under these unexplored mountains that lay between the Great Lakes and Puget Sound. A map of the Northern Pacific between Lake Superior and Puget Sound will show the line of the road running practically due west from Fargo in North Dakota to Glendive in Montana and then taking a long southerly curve by way of the Yellowstone River through Billings and Bozeman, swinging northerly again through Helena and Missoula to Lake Pend O'reille, and then rather sharply southwesterly through Spokane, Sprague, and Ritzville to Pasco

668 on the Columbia River, and here turning sharply northeasterly up the Yakima valley and on a general curve crossing the Cascade Mountains. The curve formed on its course to Lake Pend O'reille is sharper than the one formed at Pasco. The deflection northward from Bozeman on a line to Kootenai is greater than the deflection southward from Kootenai to Pasco. And now after more than half a century this Court is invited to hold that the route between the towns of Lind and Ellensburg is not the most eligible because not the most direct, and that for all engineering difficulties it could as well follow the line of the Milwaukee. Equally the Court might be asked to say that as to any other part of the route whenever in its two thousand miles to tidewater it departs from the direct line. If this Court may now compare this line with the Milwaukee here it might with equal reason make that comparison at other places, notably in Idaho. If the court may now hear expert opinion, I can conceive of no other admissible sort of evidence, even upon the com-

parative engineering features of the Northern Pacific and the Milwaukee lines, it might as well be called on to institute such a comparison with the Great Northern. I imagine that if I ever started to hear evidence upon the question of which of these three lines had the "most eligible" route from Spokane to Puget Sound, either of the three companies would be able to make a perfect case for its own road, and at the end of it all I could only conclude each was eligible, but which was most eligible is simply a matter of individual judgment. I do not misapprehend counsel. I understand perfectly he is not setting up any line as a standard;
but surely if I am to condemn the line taken by the Northern
669 Pacific as unauthorized by law I must have some standard
to guide me. Except by comparison with some line actually built I cannot know judicially or personally how one might or ought to be built, and counsel tenders no other standard. So the fundamental question on this subdivision is, may the court construct an imaginary line for this part of the route and admeasure the grant by that line and not by the line actually built? I am clear the court is without authority to do that. In the first place, if the line built was within the law the company has title to lands thereby earned. If it is outside the law then it did not earn the lands and cannot, other questions aside, rightfully claim to have the land administered as it has been by the Interior Department. This is precisely what is in the cases relied upon and is precisely the judgment rendered in those cases. In St. Paul & Pacific Railroad Company vs. Northern Pacific Railroad Company, 139 U. S. 1, the sole question was whether the St. Paul and Pacific company could claim to have earned and was entitled to receive lands by the circuitous route which it claimed a right to build. It was held that the Company could not. So, in United States vs. Oregon & California Railroad Company, 164 U. S. 526, the question was whether the Company by the kind of line it claimed to have built, had or had not earned lands which had been forfeited by Act of Congress. So, likewise, in United States vs. Northern Pacific Railroad Company, 152 U. S. 285, the language quoted from Mr. Justice Harlan that authority given to adopt the most eligible route did not authorize it to cover an unlimited
extent of country north of the forty-fifth degree, and that
670 any unnecessary deviation would be deemed not within the
contemplation of the grantor. The court in that case was discussing only the question whether the title to the particular tract involved passed under the grant to the Northern Pacific of July 2, 1864, or under the Joint Resolution of May 31, 1870. There is neither authority nor legal principle for the proposition that the lands earned may stand in part because of the line on which the road was actually constructed, and be taken away in

part, because the road ought to have been, but was not, constructed on another route. In the next place, this court knows judicially the principal topographical features of the country within its territorial jurisdiction, the general climate, and soil condition, and, of course, knows where the towns and communities are situated. No averment can take out of the pleadings that knowledge, nor deny to the judge the right to use it in determining the sufficiency of the pleading. I think your Honor knows judicially, as I am quite clear I know, that in the '70's or early '80's, looking to an early and extensive development, the route up the Yakima valley was the most eligible. I think, moreover, it would not be possible to alter my views about it by any amount of expert testimony, and neither do I think it would be permissible to offer such testimony. In any event, however, it cannot be doubted that when in good faith (and bad faith is not alleged here) the company chose that route and in so choosing followed the best judgment of locating engineers and officials, and the contrary is not alleged, it was fairly and intelligently exercising the discretional judgment committed to it by Congress; and when there is added to this the approval of the line by the Secretary, the administration
671 of the grant for more than fifty years based on that approval, the acquiescence of every department of the Government of the United States in that approval, my mind, at least, is convinced beyond doubt that the line as built was fully authorized by law. It is not necessary but I feel constrained to add that the result of this choice has magnificently justified it to one who knew this section of the country in 1886, and knows it today. Perhaps this one other thing should be added. I do not think it makes the slightest difference with what intention the Secretary approved the maps of definite location, or with what intention he administered the grant. If within the law the company might locate and build its line where it did, neither the approval or disapproval of the Secretary, as I have already pointed out, could affect the company's right in the slightest degree. And, moreover, if he did make the approval with the intention charged at the time, in view of the fact he never withdrew that approval, it must be conclusively presumed that even with the changed proposed construction from down the Columbia to up the Yakima in his judgment the route taken was justified even then. I hold, therefore, that the demurrer to this subdivision should be sustained.

672 XI

WALLULA OVERLAP

Subdivision XXVII of the bill relates to the application of the moiety rule to the Wallula Overlap. In argument the plain-

tiff dismisses that subdivision—it is quite immaterial whether for the reasons presented in defendants' motion to dismiss or for other reasons not disclosed. Mr. Lyons suggests that whether a bill in equity or distinct subdivisions of it may be dismissed rests, within certain limits, in the sound judicial discretion of a court of equity, and that therefore I should require the plaintiff to disclose his reasons and secure permission before the dismissal can be effected. I deny this application for the reasons, in the first place, that I do not think it comes within the terms of the reference, but, in the second place and, principally, because I do not think in any event this course should be taken. This subdivision of the bill claims that the measurement of the grant to the railroad should be diminished by certain acreage from application of the doctrine of moiety applied to overlapping grants. The railroad company in its argument on the motion to dismiss this subdivision maintained the doctrine did not apply where the overlapping grants were to the same road, one to the main line and one to the branch. Whether the dismissal was ordered on motion of the defendants or granted on application of the plaintiff cannot make the slightest difference. That claim is out of the case in either event. Therefore in the final adjustment
673 of the grant any claim for a diminished measurement by reason of the Wallula Overlap will be disregarded and the measurement of the grant determined upon the theory that nothing was deducted by reason of the application of the moiety rule to the Wallula Overlap. Judgment upon the adjustment will, of necessity, be final determination of the lands in the alleged overlap and bind all parties to this litigation.

674 XII

MOUNT RAINIER EXCHANGE ACT

Subdivision XXV charges that under the Act of March 2, 1899, Congress, acting upon erroneous information which had been presented to it enabled the Railway Company to relinquish to the United States thousands of acres of land of low value and to select in lieu thereof from the public lands of the United States a comparable acreage of much higher value. Whence this erroneous information was conveyed to Congress is not stated. The entire allegation of this subdivision is contained in seven lines and is precisely as stated above. The Act referred to is known as the Mount Rainier Exchange Act. When its terms were accepted by the railroad company it became a contract, and when carried out as alleged the contract was executed and done with. The Act like any other Act of Congress, as is insisted at so many

places in this case, was a law as well as a contract, and with all the force and potency of law. Patently if the contract in question were between private individuals the averments of the subdivision would be totally inadequate to induce any court to enter upon an investigation of the question. I think they are equally inadequate in this case. There is, however, a much more controlling reason why the motion to dismiss this subdivision should be sustained.

The argument of Mr. McGowan in support of the subdivision is that it was enacted ostensibly for the purpose of including Mount Rainier in the National Park. That within the park the Northern Pacific had a maximum of 90,000 acres of land made up of the mountain and its foothills which were relinquish-
675 able under the Act. That in the third section of the Act which provides for the relinquishment by the Company of its lands within the Park area there are the innocent words, "also the lands in the Pacific Forest Reserve." That as a result of those words—the railroad company obtained the right to relinquish to the Government some 350,000 acres of land in the Pacific Forest Reserve which was not in any way a part of the Park area; that these lands were of little value and the company received indemnity selection rights tremendously valuable and unique in character, for that they were applicable to any public lands, either surveyed or unsurveyed, in any state through which the railroad ran. Reference is made to the case of United States v. Northern Pacific Railway Company, 170 Federal 498, affirmed by our Circuit Court of Appeals, 176 Fed. 706, and an excerpt from the opinion of Judge Hunt in deciding the case in 170 Fed. is quoted; and it is said these cases constitute a judicial recognition that the selected lands were more valuable than the lands relinquished. The opinion of the Court of Appeals in the case states concisely the question. The language of the Act to be construed was: "Said company is hereby authorized to select an equal quantity of nonmineral lands, so classified as nonmineral at the time of actual government survey which has been or shall be made of the United States, not reserved * * *, and so forth. The railroad company was contending for a construction which the Court said would give to that language the precise meaning it would have if the provision read, "Said company is hereby
676 authorized to select an equal quantity of public lands classified as nonmineral at the time of the actual government survey." The court ruled any ambiguity in the language of the Act was more manifest than real, and overruled the contention of the railroad company, holding that if at the time of the application for the land by the company the land was classified as mineral the selection should be rejected, and if re-

turned by the Government surveyor as nor mineral inquiry as to the facts remained open until the time of issuance of patent upon the well-established doctrine of the Supreme Court. There is nothing else in the case, and I do not see that it has any pertinency in the argument.

As sustaining the charge that Congress was misinformed reference is made to report No. 2300 of the Committee on Public Lands at the third session of the Fifty-Fifth Congress: "Railroad lands within the proposed park are, in large part, heavily timbered and, hence, their exchange for other lands will in no way injure the United States but be a direct public benefit." It is then said this statement is untrue and reference is made to certain affidavits appearing in the record of the Joint Committee investigating the land grant in support of the charge. But even if I could consider this evidence it amounts to nothing. Certainly the deliberate conclusion of a committee of Congress, and the deliberate Act of Congress upon the report of such committee may not be set aside by affidavits. The controlling reason, however, governing that subdivision rests upon an anciently settled rule of our jurisprudence, thus stated by Mr. Justice Brewer in Angle v. Chicago, St. Paul &c. Railway, 151 U. S. at page 18: "The rule, briefly stated, is that whenever an
677 Act of the Legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators or the reasons which were spread before them to induce the passage of the Act. This principle rests upon the independence of the legislature as one of the coordinate parts of the Government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently or corruptly." It certainly cannot be reasonably argued that the charge in this subdivision does not fall within the principle—indeed within the explicit terms of the principle as thus declared. But it is argued the principle has no application here for that in this very case the court permitted two Acts of the Legislature of the State of Wisconsin to be impeached for fraud. This calls for a consideration of that case.

The facts disclosed were that the United States had granted lands to the State of Wisconsin to aid in the construction of railroads. That the State had granted a portion of these lands to the Omaha Company for the purpose of constructing a defined line. It, also, had granted another portion to the Portage Company to aid in the construction of another and different, and to some extent, competing road. The latter grant was conditioned upon the completion of the road within a specified period.

Work was begun upon it but in the panic of 1873 the company broke down. In 1878 the legislature of Wisconsin extended the time for construction. In 1881 a contract was made with Angle for its completion under which construction was resumed with vigor and diligently prosecuted with every prospect the road would be completed within the extended time. In 1882 before the
678 expiration of this extension the Wisconsin legislature revoked the grant to the Portage Company and bestowed it upon the Omaha Company. As a result the work which Angle was performing under his contract was stopped and he was prevented from completing its performance. He then commenced an action against the Portage Company in which judgment was recovered. Execution upon this judgment having been returned nulla bona a bill in equity was filed in the Circuit Court of Wisconsin by his administratrix against the Omaha Company to reach the land grant of the Portage Company then in the hands of the Omaha Company. The bill charged that the Omaha Company had conspired with and bribed certain officials of the Portage Company who had become the sole stockholders in that company to wrest its land grant from the Portage Company and to prevent Angle from completing the contract. It set forth certain Acts done under the conspiracy; amongst others that the Legislature of Wisconsin had been induced by the conspirators to forfeit the grant. The question came before the Supreme Court on demurrer which had been sustained by the Circuit Court. Remarking that as all facts well pleaded must be taken as true, it appeared that the officials of the Portage Company had been bribed by the Omaha Company to betray their trust, and that the Legislature had been induced by false allegations to revoke the grant of the Portage Company and bestow it upon the Omaha Company. That as the breaking down of the Portage Company and the consequent loss of the contract and its profits to Angle was a direct and natural result of these Acts the contractor could resort to equity to enforce against the land grant in the hands of the Omaha Company a judgment which he
679 had obtained at law against the Portage Company. It was conclusively presumed that the legislature in conferring the grant on the Omaha Company did not intend to affect thereby the rights of the Portage Company as against the Omaha Company in the Courts. That when the grant passed to the Omaha Company it, by reason of its fraudulent conduct, became as to the creditors of the Portage Company a trustee ex malefacio in respect of this property.

The principle thereupon declared was that where one maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other,

the injured party may maintain an action against the wrongdoer. That the Omaha Company having become, as charged, the sole stockholder of the Portage Company, it could not secure a transfer to itself of the property of the corporation so as to deprive a creditor of his debt. The Court then in consideration of the Acts of the Legislature charged to have been fraudulently procured, after using the language I have quoted above, held that the wrongs of the Omaha Company were done before the legislature passed either of these Acts and that it is to redress those wrongs—those done in advance of the legislation—that the suit was being waged. That the legislation could not and did not undertake to condone the wrongs of the Omaha Company and relieve it from liability to the Portage Company. That the resumption by the legislature of the land grant and the regrant to the Omaha Company did not make lawful its Acts in bribing the officials of the Portage Company and did not relieve it from liability. That the legislature could not have acted judicially and in effect decree the wrongs done by the one company to
680 the other did not create a cause of action. The wrong was not one done by the legislature in taking away the grant but the wrong consisted in the things done by the Omaha Company which put the Portage Company in the position apparently calling for this legislative action. That there is no more challenge of the valadity of this legislation in the suit against the Omaha Company for the wrong it did leading up to the legislation than there is challenge of the validity of a criminal proceeding by an action against the prosecutor for malicious prosecution. That while it might be that the legislature is presumed to act with full knowledge of the situation and knew the wrongs done by the Omaha Company to the Portage Company, and knew these wrongs had disabled the Portage Company from proceeding with its work, they consequently knew that thereby a cause of action had arisen to Angle against both the Portage and Omaha Companies and if, with all that knowledge, they passed the statutes referred to, it did not follow that such legislation intended or was potent to relieve the Omaha Company from its liability to Angle. That in this suggestion there was no impugning the motives, the wisdom, or power of the legislature. It acted as a guardian of the public interests to which all private interests must yield, and it might as well have thought that notwithstanding the wrongs that had been done by the Omaha Company, or indeed as a result of them, the Portage Company had become disabled and could not go on with the work, and that the public interests called for the taking away of the grant from the Portage Company and giving it over to the Omaha Company to expedite construction. It was further said that as the Courts will not interfer, with the

action of the legislature, it may rightfully be presumed
681 the legislature never intends to interfer' with the action of the Courts or to assume judicial functions to itself, and the legislature would be presumed to have left to the Courts the redress of the private wrongs done by the Omaha Company. In other words, it might well have acted upon the consideration that public interests required the speedy building of the road; that the Portage Company could not build it, and the Omaha Company could and therefore the public interests demanded taking of the grant from the one company and giving it to the other. It thus subserved the interests of the public and left the redress of the wrong to that department which had not only requisite jurisdiction but also the appropriate machinery for ascertaining the injury and enforcing the compensation due. To the argument that to permit the suit to be maintained and subject the lands in the possession of the Omaha Company to the satisfaction of the Angle judgment was pro tanto to nullify the action of the legislature which intended that the transfer should be absolute, without limitation and subject to no contingencies or burdens, it was ruled that the legislature affirmatively expressed no such intention; it made the transfer leaving the property subject to all the burdens and contingencies which might arise in the ordinary course of law. It was further held that if it should be conceded that under the true construction of the grant and of the Act extending the time the Portage Company was in default at the date of the forfeiture, and that the legislature had then the absolute right to forfeit the grant, such concession even would be no answer to the cause of action. The mere fact that the Portage Company could not enforce a legal right to the lands against the
State did not absolve the Omaha Company from liability
682 for the wrongs which resulted in putting the Portage Company in condition calling for legislative action in furtherance of the public interests.

These principles have their fullest application to the case at bar. Congress enacted no legislation of either special or general character modifying or repudiating the contract created by the Act pleaded. I do not think it could after the lapse of all these years to do so, but the fact remains it has not done so. If, under these long established principles an individual may not impugn either the motives or the intelligence of Congress in legislation, much less may the legal department of the Government undertake that task. It is clear to me that the Attorney General may not call upon the courts of the United States to examine into the motives or question the wisdom of Congress in legislating within its conceded powers.

I sustain the demurrer to this subdivision.

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XIII

MINERAL CLASSIFICATION

In Barden v. Northern Pacific Railroad Company, 154 U. S. 288, in an opinion handed down May 26, 1894, the Supreme Court ruled that mineral lands did not pass to the railroad company under its grant, and that inquiry as to the mineral character of any lands otherwise within the grant was open at the suit of one seeking to make a mineral filing until a patent should issue to the company. It was held further that a patent issued in proper form after examination of the subject by officers of the land department charged with its preparation and issue determined conclusively that the lands were nonmineral, and unless set aside and annulled by direct proceeding would estop the government from contending to the contrary in the absence of fraud in the officers of the department, and such patent would be conclusive in subsequent proceedings respecting the title. Presumably because of some intimations thrown out in this case Congress passed the Mineral Classification Act of February 26, 1895 (28 Stat. 683). By this Act the Secretary of the Interior was directed as speedily as possible to cause all lands within the Bozeman, Helena, and Missoula land districts in Montana and the Coeur d'Alenes district in Idaho to be examined and classified with special reference to their mineral or nonmineral character. For that purpose the President was directed to appoint for each of these land districts three commissioners. It was enacted that lands should be classified by the commissioners as mineral which

684 by reason of valuable mineral deposits are open to exploration, occupancy, and purchase under the mineral laws, and that in making the classification the commissioners should take into consideration the mineral discovered or developed on or adjacent to the lands, the geological formation of the examined lands or adjacent lands, and the reasonable probability that the land might contain mineral deposits because of its formation, location, or character. The commissioners were further directed to examine in forty-acre tracts, first, the lands surveyed prior to the Act and thereafter as speedily as possible to examine and classify the unsurveyed lands. They were required on or before the 5th day of each month to file in the land office of each district a full report in duplicate on such forms as the Secretary of the Interior may prescribe showing the lands classified in the preceding month, on legal subdivisions of surveyed lands, and by natural monuments of unsurveyed lands, as mineral or nonmineral. Notice is required to be published of this classification and any person might protest the classification of any of the

lands, and a hearing was to be had thereon before the officers of the land district as near as might be under the rules of other mineral hearings. It was enacted that as to lands classified whereof no protest shall have been filed such classification when approved by the Secretary shall be considered final except in case of fraud; that as to all lands protested and all classification invalidated for fraud the ruling of the Secretary after hearing shall finally determine the classification. The commissioners are further by the Act directed to make examination and to take evidence of witnesses as to the mineral or nonmineral character of the lands. The Secretary of the Interior was directed to
685 prescribe rules and regulations to govern the procedure of the commissioners. The work was required to be finally completed within four years after the date of the Act. It was provided further that the commissioner should receive for their compensation $10 for each day actually employed in the performance of their duties, which should include their transportation and subsistence expenses, but the total amount of compensation to be paid to each commissioner annually should in no case exceed the sum of $2,500.

The Secretary, on April 13, 1895, issued his instructions to the commissioners. So far as material here these instructions directed them to commence with those surveyed tracts which are prima facie non-mineral, observing as nearly as practicable a consecutive order in the examination to the end the grants may be adjudged in that particular as rapidly as consistent with accuracy. The examination was directed to be as to each forty-acre subdivision and they were to note carefully all evidence and testimony and all facts observed relative to each tract or tracts adjacent thereto. It was further said to them in the words of the Act that all land should be classified as mineral which, by reason of valuable mineral deposits, are open to exploration, and so forth. All tracts for which patent had issued, either as mineral or agricultural, were to be eliminated from the examination and classification, but notes shall be taken of all subdivisions containing patented mining claims as the remaining portions of such subdivisions are declared by the law to be prima facie mineral and must be so classified unless the character thus impressed is disproven by testimony, or otherwise. Whenever in doubt as to the proper classification of any par-
686 ticular tract the commissioners were instructed to avail themselves of such evidence as might be obtainable, and take testimony of such witnesses as seemed necessary. The attention of the commissioners was called to the fact that as this was to be a final determination of the character of the lands they should

necessarily avail themselves of all testimony, formal or informal, likely to aid them in making an accurate classification. Forms for return were contained in the instructions. It was directed that hearings on protests filed should be conducted in accordance with the rules of practice (Ed. August 6, 1894) and with paragraphs 109 et seq. of the general mining circular of December 10, 1891. In a letter to the commissioner of the general land office of date June 20, 1895, from the Secretary the request of the commissioners for a surveyor was approved; for a stenographer was denied; for a modification of the instructions directing that the minutes of each day's business shall be completed and written before the next day's business shall have begun was denied; compensation for work on Sundays was directed not to be allowed. Under date of June 15, 1895, further instructions were issued in response to certain questions by the Board. By these they were directed to examine for purposes of classification odd numbered sections only, but attention was called to the provision of the Act requiring the commissioners to take into consideration the mineral discoveries or development on or adjacent to the lands and the geological formation. They were directed that no provision was made for appointment of clerks, and the commissioners will therefore be expected themselves to perform the necessary clerical duties. They were further directed that
687 before any subpoena should issue for witnesses to furnish the Secretary a list of the witnesses proposed to be examined, the distance they will be required to travel, a statement of the probable cost of witness fees, mileage and cost of serving summons; to the end that the Secretary might correctly determine whether there was sufficient appropriation to meet such cost. Extensive and extremely intricate certificates and receipts were provided for in these instructions. In response to a question whether the land should be personally inspected when the testimony clearly shows its character they were instructed to take such testimony and make such personal inspection as would satisfy their judgment as to the proper classification. An examination of these instructions, the forms accompanying them, and the details necessary to be filled out in these forms, in view of the fact that the commissioners were required to do this work themselves without clerical or stenographic help, and that each day's report must be completed before commencing on the next day's work, causes one to wonder how much time would be left for actual field work in the course of a month. This Act is difficult to interpret, doubly so because, however construed, it runs into an absurd, and in some of its provisions, an impossible result. It is, of course, fundamental that if possible a statute

should be so interpreted as to avoid this. If the language employed admits of two constructions, and according to one the enactment would be absurd, while according to the other it will be reasonable, the latter should be adopted. It is equally fundamental, however, that if the language necessarily forbids any other construction than one leading to an unreasonable result it is the duty of the Court to adopt and enforce that con-
688 struction. Perhaps these rules may be adequately compended by saying every statute where it is possible so to do must receive a sensible and reasonable construction to carry out as near as may be the intent of the legislature. When such construction is impossible the court must take the statute as written and enforce it as well as may be.

Upon its face this statute seems reasonable enough, and not difficult of construction. It is only when it is applied to the physical facts with which Congress was dealing that the difficulties commence. As each commissioner was to receive but ten dollars for each day he was actually engaged in the performance of his duties, and out of that sum was to pay all his transportation and subsistence expenses, and as the total amount of compensation to be paid annually should in no case exceed the sum of $2,500, it seems reasonably certain Congress contemplated that the commissioners should be actually engaged in the work for not more than 250 days in the year. Considering the country in which the work was to be carried on it is certain that field work could not have been possible for that number of days. It would take eight months and a half, approximately, of the year when, as ordered, Sundays are excluded. But the snow falls too early in the Autumn and remains too late in the Spring to permit work in the field for all this time. I think it is fair to say that about 200 days would be the limit per annum for field work.

The total area to be classified within four years from the date of the Act was, in round figures, 11,500,000 acres. Assuming (what is probably not a fact) that this acreage was equally
689 divided among the four districts, each of the four boards would have been required to classify 2,875,000 acres, or 718,750 acres per year. If I am right in the estimate of 200 working days that would give 3,593+ acres to be classified each day or, in round figures, some five and one-half sections. As the Act required, and so likewise did the instructions, that the classification was to be made in forty acre subdivisions where surveyed, and in substantially equivalent tracts where unsurveyed, merely walking across in a straight line would require twenty-two miles of travel per day. This is assuming the commissioners were at the point where the examination commenced. If some-

what permanent camps were established, to this would be added the going from and returning to the camps once or probably twice a day. Otherwise all the paraphernalia of camping equipment must have been carried forward and set up for each day's work. In a level, flat country, without any particular difficulties of terrain, I presume that men could have been selected who, day in and day out, for several months, might have done this amount of walking and in the evening have filled out their forms classifying the result of the day's work. The lands to be classified under this Act, however, lay in the Rocky Mountains. Here were high, precipitous mountains to be climbed only with the greatest difficulty and by men specially inured and trained to this sort of travel. Rivers were to be crossed or avoided. Deep canyons and gulches penetrated these mountain ranges at frequent intervals. Except in the river valleys there was no level land. Much of the land, moreover, was covered with timber and undergrowth, and on many of the foothills and the mountains the surface was so broken up as to make ordinary travel over it extremely
690 slow, difficult, and tiresome. I do not think it possible under any circumstances that the ordinary man who, in the course of appointment, would become a commissioner in these districts, could have travelled that distance daily. If we extend the actual working days to 250 there would be four and a half sections instead of five and a half to classify per day. This would require eighteen miles of walking instead of twenty-two. This would not greatly reduce the impossibility of covering the field work in that time.

But by Section 3 of the Act it is provided in express terms that all lands shall be classified as mineral which by reason of valuable deposits are open to exploration, occupancy, and purchase under the mineral laws, and that the commissioners in making the classification shall take into consideration mineral discovered or developed on, or adjacent to, the land, the geological formation of the lands to be examined and classified, of the lands adjacent thereto, and the reasonable probability of such lands containing valuable mineral deposit because of formation, location, or character. It is plain that merely to walk across the land would allow no adequate examination—would give no adequate information of the very things the commissioners were appointed to find out, and were directed to determine. It takes but little knowledge of the formation and deposit of minerals to understand that something more than a cursory glance is needed to form even a rough estimate as to whether a given tract is mineral. If it were intended that the commissioners should examine the geological formation, not only of the lands to be examined, but of the adjacent lands—if it were intended that such an

691 examination should be made as would enable the commissioners to determine with some degree of reasonable approximation whether mineral existed in such quantities as to make it reasonably probable that valuable deposits existed, it is obvious that much time, much careful examination of rocks and terrain would be necessary. In the plainest and most direct terms the Act directs the commissioners to examine or make examination of the lands to be classified. Lexicographically, as well as in the ordinary use of the term to "examine" a physical object, means to scrutinize as, for instance, to examine a mineral, or to examine a ship as to her seaworthiness, using illustrations given by Mr. Webster. I cannot imagine an examination of land by any other method than going upon it, looking at it, and seeking thereby to discover such qualities in the land as are the purpose of the examination. I can well see how it might be determined that land is timbered or prairie, mountain or valley, level or broken, by observation from some convenient point, bringing it within the range of one's vision; but to examine to determine whether it is mineral or not by such observation would be, of course, mere mockery. It is obvious, too, that no such quantity of land as was necessary to be examined per day could have been reasonably classified, even by men of some degree of skill and knowledge, tract by tract. I suppose that competent geologists, if left to work it out in their own way by a process of excluding areas which could not conceivably be mineral, segregating other areas which might be, and examining these latter with some degree of care might arrive at a fairly accurate determination as to the lands which ought to be classified as mineral, and

692 those which ought not to be. But the pay authorized by Congress, of course, prohibited the appointment of any such men, and the record shows that most of the commissioners appointed had no special knowledge whatever of the subject. It is obvious then that to give this statute a reasonable and sensible construction it must be held that all that was intended was a rough survey or inspection by men without any special training for the work, and a consequently rough determination of the lands to be excepted from the grant as mineral. So construed, the statute in the manner and by the means above designated is workable and some sort of classification is possible. I see no escape from this construction. If it be adopted and the work was so done, it is manifest that many mistakes must have been made. Indeed, I think that a great portion of the land must inevitably have been mistakenly classified, even by men seeking honestly, diligently, and employing the very best means and agencies at hand to determine correctly. I suppose, too, that these commis-

sioners might very well have with a fair degree of accuracy determined in the manner pointed out, and within the time allowed, what lands were agricultural. Everyone knows, however, that lands seemingly agricultural within the sense of the land laws may and often do contain valuable mineral deposits. Every one knows, too, that lands seemingly wholly unfit for agriculture may be, as alleged in this subdivision, unmineralized and wholly without deposits of minerals or geological possibilities of such deposits. Setting aside, therefore, as probably approximately correct, land classified as agricultural, it seems certain that frequent gross and easily discoverable errors must have crept into the classification of the remainder of the lands.

693 In due course commissioners were appointed, instructions were issued by the Secretary, the work was begun, all protests disposed of and, on completion, the classification was approved by the Secretary.

In subdivision XXXVIII of the bill it is charged that the classifications made by the commissioners and approved by the Secretary were fraudulent. Whether the charge goes to the whole or only a part is not sufficiently stated, and it is impossible to discover the purpose of the pleading in this respect from its general allegations. I infer, however, that it is not intended to charge that every tract was wrongfully classified. Neither is it possible to determine how much acreage was improperly classified, nor is it certain that it is intended to charge that any land classified as agricultural should have been assigned a mineral character, although it is perhaps inferable that some of it was, in fact, mineral. Whatever may be the purpose of the pleading in that regard, no definite acreage is alleged. It is alleged, however, that 3,782,379 acres were classified as mineral, and the classification approved by the Secretary. It is not said that all this acreage is, in fact, nonmineral, but from other averments it may be presumed that at least a portion is. It is alleged that mineral lieu selections totaling 1,330,762 have been made by the railroad company, approved by the Interior Department, and patents thereupon issued; and that the company now claims the right to make indemnity selections for the remainder.

It is further averred that the reports made by the commissioners to the Secretary and upon which he approved the classifica-
694 tion were untrue in that they thereby represented that they had been upon and made personal examination of the lands, when in truth and in fact large portions of the lands at the date they were reported to have been visited were so covered with snow as to have rendered their examination impossible; that other tracts by reason of their extent could not have been

examined within the time reported, and that whereas the report showed a classification with reference to the mineral or non-mineral character of the lands, they were in truth classified with reference to value—those of low value as mineral, and those of high value as agricultural. It is then alleged that the railroad company knew the falsity of these reports for that its agents were with the commissioners and knew that personal examination in many instances had not been had and knew the classification had been made with reference to value because in many instances this had been done at their solicitation; that notwithstanding which knowledge they failed to inform the Secretary, intending the company should profit by the fraud. It is further charged that from March 1895 to April 1897 one A. A. Crane was a commissioner for the Coeur d'Alene district, and from May 1895 to April 1897 one John B. Goode was a commissioner for the same district. That sometime in 1896, the date not being fixed, the railway company entered into certain executory contracts with said Crane and Goode to cut timber from certain of its lands, and that these contracts were outstanding during the remaining term of these two commissioners. It is then said that "similar contracts" were made with others of said commissioners during their term. It is alleged, also, that every member of the several boards was, for the whole term of his office, a
695 recipient from the railway company of free transportation, and other benefits and favors.

The conclusion drawn by the pleader from the foregoing allegations as stated at the close of the subdivision is that the Northern Pacific Railway Company is not entitled to additional lands or moneys from the United States by reason of said classification, and no other relief is prayed for by the bill.

To this subdivision the defendants demur and plead against it laches and estoppel. I will first dispose of these pleas. The opinion has already been expressed that laches is not pleadable in bar against the United States, and, therefore, I hold this plea must be overruled. I do think, however, that the doctrine of the United States v. Stinson, supra, is peculiarly applicable; not only is there lapse of time, probable death of many or most of the commissioners, changed conditions, and other elements adverted to in that case, but there is the added difficulty and uncertainty of determining at this time how many of the errors alleged may have resulted from the fraud charged or may have arisen from the necessary character of the work, the conditions under which it was necessarily performed, and the sort of classification compelled by the Act.

The plea of estoppel gives me more trouble. It appears from the evidence in support of this plea that not later than 1908

Congress, the President, and the Secretary were advised that the classification had been unscientifically done, that many of the commissioners had been unqualified for that sort of work by
696 reason both of ignorance of mineral formation and of physical unfitness to endure the hardships necessary to the work. On March 11, 1908, a committee of the Montana Mining Association reported fraud in the classification, and suggested the matter be laid before the President, the Secretary of the Interior, and Congress so as to secure a reclassification (N. P. Exhibit 59). A committee from the Association was sent to Washington, saw the Secretary, and filed with him its report; and called upon and complained to President Roosevelt of the manner in which the work of classification had been done. On March 4, 1909, the legislature of Montana sent to Congress a memorial charging the classification to be unscientific, worthless, and praying that a reclassification be made in the interest of the miners and prospectors of the State of Montana (N. P. Exhibit 60). It further appears that a special agent had been sent out by the Department to investigate the whole subject, and that he made two reports, disclosing most, if not all of the facts now alleged. One of these reports (N. P. Exhibit 57) of date February 1, 1908, detail many charges of fraud, some of which he says were probably true. He reports further that the work was done unscientifically and ignorantly, and that the Northern Pacific sent its agents with the commissioners to examine the land. He reported again on March 12, 1908 (N. P. Exhibit 58). In this report he discussed the question fully, and with headings for each subject. He declared the classification did not determine the mineral or nonmineral character of the land—condemns the method by which three men with little practical knowledge of mining were required to determine from present known conditions, whether vast
697 areas of mountainous country did or did not contain minerals—something incapable of determination at the time—and knowledge of which could only be obtained from the science of geology, the perseverence of prospectors, and actual miners demonstrating in time the extent to which mineral existed in these mountains. He reports that great areas of land were classified as mineral and that a large percentage of the classification was fraudulent within the meaning of Lamb v. Northern Pacific Railroad Company, 29 L. D. 102. He discusses the question as to whether wholesale attacks should be made with a view to secure reclassification. That an actual inspection of each forty-acre subdivision would result in finding that large bodies of land now classified as mineral would have to be reclassified as nonmineral. That under any reclassification the Northern Pacific would take title to many odd-numbered sections containing timber sufficient

to make them valuable, and recommended that all present classifications now final be suspended until a resurvey and reclassification; that all further issuance of patents be likewise suspended until a final examination should have been made, and the scope of action to be taken determined by the Department. He points out that the railroad company has sold a portion of the land it has received under the classification, and that the purchasers would, doubtless, be able to show their purchase to have been innocent.

It appears that the Secretary of the Interior made an order against further issuance of patents: that thereafter Mr. Cooper,
Land Commissioner of the railroad company, and the Sec-
698 tary of the Interior conferred upon the subject and that
an arrangement was entered into between them by which certain of the lands were reclassified and other lands permitted to remain under the old classification. The agreement that was come to is shown in Northern Pacific Exhibits No. 80, 81 and 83. Thereafter no further steps were taken by the Government until the passage of the Act of June 25, 1929, and the bringing of this suit. In the meantime patents have been issued to the company for the lands classified as agricultural and it has made, with the approval of the Secretary, lieu selections for a portion of the lands classified as mineral. The United States has included in its Forest Reserve, a large, perhaps the larger, part of the classified lands, and by the Act of June 25, 1929, has declared its intention to retain them. It has taken possession of and dealt with the lands classified as mineral. Some has been disposed of under the mineral laws and some under other land laws. It has sold large quantities of timber cut from the lands classified as mineral and received therefrom considerable sums of money. As already remarked it is conceded to be now impossible to restore the status quo of these lands by reason of the way both the Government and the company has dealt with and disposed of the lands allotted to them respectively by the classification.

I am of the opinion that on final hearing, nothing being shown to alter this effect, the recited facts would be a complete defense. I am not willing, however, to sustain the plea until a full in-
vestigation can be had of the charges. I am moved to this
699 view in part by the frame of this portion of the bill, and
by the concessions and positions taken by the government in argument of the demurrer, and in part by the conclusions which I have reached upon the demurrer.

The charge in the subdivision that agents of the railway company accompanied the commissioners in their inspection trips, conferred with the commissioners as to whether lands should be classified as mineral or nonmineral, and suggested, recommended,

nd importuned the commissioners to classify the lands as min-
ral, or nonmineral upon the basis of values and without ref-
rence to the true character of the lands, and that in many
nstances the commissioners acceeded to these importunities, and
lid so classify the lands, taken with the alleged facts that the
eports were false in the respects charged, and that the purpose
f the commissioners, in some cases at least, was to classify on
he basis of value and not on the basis of mineralization, does,
think, sufficiently charge fraud on the part of the commis-
ioners, and connivance therewith, if not procurement therefor
y these agents. The subdivision, however, does not state other
han by the term "in many instances" the extent to which that
raud resulted in the misclassification.

I hold, too, that the allegations as to the contract with Crane
nd Goode sufficiently charges fraud for the time that contract
was in effect. As they constituted a majority of the board for
he Coeur d'Alene district and as, under the Act a majority con-
rolled, it is, I think, sufficiently charged that, to some extent, the
lassification made while this contract was in effect was fraudu-
lent. It is evident, however, that as reports were made
700 by subdivisions it would be easy for the Government to
determine the precise lands classified during the life of
hat contract, and to specify which of those lands had been
misclassified. The subdivision, however, does neither. It con-
tents itself with the allegations of fraud, and with the resultant
misclassification in some quantities.

I think, too, that the giving of passes to the commissioners
may, as a fact, have resulted in influencing the commissioners
in making classification. Of course, at that time there was no
law against a railroad giving passes. Having reference to the
practice of the times I have no doubt that most of the Congress-
men who passed this classification Act, the Secretary of the In-
terior, and other officials of the department who administered
it, rode upon railroad passes of this company. The practice was
so universal that no court can profess to close its eyes to the fact.
One cannot help suspecting, too, that when Congress fixed the
compensation for these commissioners it anticipated they would
be furnished by the railroad company with transportation. Be
hat as it may, however, the passes must have been issued by the
ailroad company to the commissioners for some purpose. The
ompany may not have expected thereby to directly influence the
udgment or the action of the Boards but may have thought
hat the failure to issue passes in accordance with the custom
would have been resented by the boards and might have worked
o its disadvantage. It may be, too, that these passes did not
nfluence the commissioners, either consciously or unconsciously.

On the other hand, it may well be that in some instances the passes did, to some degree, at least, govern their judgment.
701 I feel, therefore, that it is a question of fact to be determined upon all the evidence the purpose for which the passes were given, and the actual effect in the classification the receipt and use of passes had. I do not think a general inference may be drawn that because of the passes the classification was fraudulent or erroneous. I think, only, that it must be determined as a question of fact. Neither do I think that because erroneous classifications were made it is to be inferred they were fraudulent. I think the presumption should be, rather, that they were erroneously made in ignorance or perhaps negligently, and before they can be held to have been fraudulently made the fact must be established by clear and convincing proof in accordance with the ordinary rules for proving fraud.

It is patent, of course, that the subdivision is wholly insufficient to give the government final relief. No basis is laid in the pleadings for reclassification in whole or in part. I do think, however, that it sufficiently charges fraud and that if a better statement of the case in that behalf was desired it should have been demanded by a motion under the equity rules.

I would, therefore, have no difficulty in overruling the demurrer were it not for the position taken by the government in argument. As already noted, Mr. McGowan did not argue the case orally, and desiring to get his views on certain aspects of this subdivision I addressed a letter to him under date of July 14, last, asking him precisely what relief he claimed. He replied, both by letter under date of July 22 of this year, and more elaborately in his written argument, that his claim is
702 defendants are not entitled to any relief in connection with the 2,400,000 acres of unsatisfied mineral indemnity selection rights. I inquired, also, whether under the allegations of the subdivision proof might be offered as to particular tracts, and that the fact questions to be determined would be as to those tracts only. To this he replies that under the allegations proof may be offered as to the misclassification of particular tracts and that, coupled with other proof, such as passes, the Crane-Goode contracts, and other matters, fraud would be established and overreaching of application to the classification generally, as distinguished from the specific tracts. I inquired, also, that having established the fraud, did he claim that the entire classification should be set aside. His position in answer to that is that he thought the government was entitled to have it set aside, but that it does not ask the court to go that far. That it is impossible to restore the situation to the status quo for the reason that the company has made disposition of many of its primary and in-

demnity lands. He replied, further, and so argues, that a reclassification is not necessary, and the court is not asked to reclassify. Finally I inquired that if the government's position was that the railway company may keep the place lands classified to them, and likewise the indemnity selections for losses on account of the mineral classification, but that all right of further selections on account of losses under this classification shall be decreed forfeit, whether he based that claim upon the forfeiture clause in the Act of June 25, 1929, solely, or upon equitable principles and, if the latter, precisely what principle or principles govern. To this he replied and in his extended written
703 argument contends in effect that with fraud and overreaching present and in the face of the impossibility of restoring the situation to the status quo an equitable treatment of the matter necessitates a consideration of values; and when it is found, as alleged, that the values of the mineral indemnity selections made equals the value of the primary lands that were classified as mineral, the company has received everything it is entitled equitably to receive and that it should be denied any further rights in the unsatisfied indemnity claims for mineral losses. That his position on the question is based on general equitable principles, and upon the forfeiture clause of the Act of June 25, 1929.

This position is ingenious and is persuasively put. I cannot, however, agree to it. By section 1 of the classification Act it is provided that when approved by the Secretary the classification should be final "except in case of fraud." By section 7 issuance of patent till classified is prohibited, and any patent issued against the prohibition is declared void. The clear effect of these provisions is that if fraud shall have determined any portion of the classification, or for that matter the whole of it, its finality ceases. So far as lands are fraudulently classified they revert at once to their previous status, that is, become at once unclassified lands subject to the rules of law regulating their further disposition as mineral or non-mineral under the grant to the company. This is the only result declared by the Statute. I can see no room to inject another or different. The purpose of Congress was to procure a classification, but that insofar as any of it was
704 fraudulently done Congress was satisfied with withdrawing from that portion of it its finality. It evidently considered this provision to be sufficient, and the courts must so administer the Act. Of course, the question of fraud might be raised by either the United States or the railroad company in an appropriate manner and at an apt time. So, by the Borden case, might any one seeking to make entry, at least under the mineral

laws. It is patent, too, that when by a suit in equity the whole or any part of the classification is assailed by either the Government or the company as fraudulent, the doctrines and rules of equity govern precisely as in any other case charging fraud, such as waiver, delay, election, and altered conditions, and that in such event every remedy accorded by the settled practice in a court of equity is open, and no other. These established doctrines or the available remedies are changed not one whit by the classification statute or by the land grant to the company, and therefore upon the question in this subdivision, if fraud be sufficiently alleged, the only possible inquiry is what remedies may the government have. Under settled principles, one claiming to have suffered from fraud may in equity sue to set aside the transaction and if it cannot be wholly set aside, set it aside in part and recover damages for that portion which cannot be undone. He may, on the other hand, affirm the fraud and sue at law for his damages or, equitable principles being otherwise present sufficiently, may sue therefor in equity. Assuredly this is the sum total of the remedy which a person claiming to be the victim of a fraud has ever had or may now have under any principle of law. As already stated the only effect of the fraud provision in the classification statute being to relieve it of finality it
705 follows that neither under the statute nor under general principles of equity may the government in this case have any other remedy than pointed out in the foregoing. Of course, a court of equity may adjust its decrees within the settled principles of its rules to meet the exigency of every case with a view to doing justice. This means, however, justice established by rule. It does not mean here any more than elsewhere in the domain of equity, unregulated justice according to the notions of what a particular chancellor may thing right or wrong. I think, therefore, the Government in this case may have any portion of the classification set aside for fraud. If for any reason a particular tract by reason of disposition or other thing cannot be upon its proper classification reassigned, then it may have money compensation as being the only other available remedy equity has ever administered in such case. I think, too, it may upon sufficient proof have the entire classification undone and the lands retained by the United States and by the railway company respectively taken into account in the final adjustment of the grant. Obviously, to obtain either of the foregoing remedies a fundamental change in the whole frame and purpose of this subdivision is necessary.

To the argument that by reason of the lapse of time and changed conditions the government cannot now obtain full justice it need only be said that its plight is no different from any other

litigant who, being obliged to accept the only remedy open to him, may not, frequently is not, made entirely whole. But there is another and conclusive reason against this claim. The delay and the changed conditions, in part at least, result from
706 the Act of the Government. It has delayed bringing suit and in its pleading offers neither excuse nor reason for the delay. It has issued patents to the railway company, has approved its indemnity selections and made conveyances therefor, and does not now, in its long delayed suit, undertake to say it was for all the past years uninformed of the facts, nor how and when it discovered them. True it is not required to make these averments, as is an individual, to avoid laches. But assuredly the Government as much as an individual where it sets up the results of its own delay and its own conduct as giving it new or unsual rights, must show why it has so long delayed, and why it has acted contrary to its present claims.

But above and beyond all that, certainly the United States ought to offer some reason why it has swept into the Forest Reserve the greater portion of the lands classified as mineral; why it has controlled and administered them for years and why it now proposes to retain them and does not now tender them for a reclassification.

On the whole I have come to the conclusion that if the government stands upon its position the demurrer ought to be sustained. However, the demurrer does not go to judgment before me, and it may be counsel will wish before your Honor to change his position, and seek further or other remedy; and I suppose he may properly do so. In that event, it will be for your Honor to determine whether the pleading should be or may be revamped. I report, therefore, that on counsel's present position the demurrer ought to be sustained.

707. XIV

FORT LARAMIE TREATY OF SEPTEMBER 17, 1851, AND BLACKFOOT TREATY OF OCTOBER 17, 1855—SUBDIVISION XXIX

The territory involved in these treaties lies to the south and west of the Missouri River between a north and south line running through Bismarck on the East to a line drawn from the Great Falls of the Missouri southwesterly, then southeasterly, and again southwesterly to a point in Idaho near the foothills of the Bitter Root Mountains. The Northern Pacific Road is practically west through the territory of the Mandans, Gros Ventre, and Arricaras to Glendive, Montana. For approximately the Eastern half of this division its place and indemnity

limits extend into the Sioux territory on the south, and into the Fort Berthold Reservation on the north. From Glendive to the crossing of the Powder River the course is southwesterly on the boundary line between the territory of the Assiniboin on the West and that of the Mandans, Gros Ventre, and Arricaras on the East. Its northern place and indemnity limits extend here far into the Assiniboin country. From Powder River the line is southwesterly through the Crow Territory, the northern line of place and indemnity limits reaching for a portion of that distance into the territory of the Blackfoot. After leaving the Crow territory the line swings northwesterly through the common hunting ground established by the treaty of October 17, 1855, to a point some distance west of Helena, with the
708 lines of the northern place and indemnity limits reaching into the Blackfoot territory proper. Government Exhibit 65 delineates clearly the limits of these tribal territories with the course of the road and place and indemnity and second indemnity lines.

Moreover, as the southern boundary of Montana lies on the 45th parallel, and as that parallel runs approximately through the middle of the Sioux country, a glance at Exhibit 65 will show that no line could have been selected by the company within the operation of its grant so as to avoid any considerable portion of these Indian territories. A line further north might have avoided entirely the Sioux and the Crow country, and the track might have been built to the north of the Assiniboin, the Mandans, the Gros Ventre, and Arricaras. A ruler put on Exhibit 65 will show that unless the road had been constructed so far north as not to earn its full grant the place and indemnity limits would have reached on the south into the territory of these tribes, and such a location would, of necessity, have traversed from East to West the vast territory of the Blackfoot.

The practical result of the Government's position on the facts pleaded is that the United States has so administered the grant that the company has received in the last fifty years more than thirteen millions of acres within the boundaries of these Indian territories to which it is not entitled, and that in some way this is to be corrected by this court in the final adjustment of the grant.

The precise legal questions presented are, first, that by these treaties all the country between the Missouri River and the Rocky Mountains, not only north, but south of the 45th
709 parallel was parcelled out to the various Indian tribes as their respective reservations and, therefore, came within the language of the grant in section 3 of the Act of July 2, 1864,

as reserved, granted or otherwise appropriated; and not within the terms of the agreement of the second section to extinguish Indian titles to all lands falling under the operation of the grant; and, second, that if the Indian title to these several reservations had not been extinguished at the time of filing maps of definite location such lands could not and did not pass to the company, but were lost to the place limits of the grant, and for them indemnity lands might be selected under section 3.

Preliminary to a consideration of these questions it may be well to call attention to certain principles having more or less bearing upon the general subject. Prior to the Revolution the English Crown had complete dominion over the land its subjects had discovered, and with that dominion went ownership of the ultimate fee in the soil. The fact of Indian occupancy, however, existed, and it lead to a recognition of a usufructuary right in the Indians. Grants from the Crown to vast tracks of land in its North American colonies were made and these grants were held to convey title to the grantees subject only to Indian right of occupancy. This ultimate fee, encumbered only with the Indian right to use, was in the States after the Revolution, and subject to their grant. The occupancy by the Indians was protected by the political power and recognized by the courts until extinguished, when the patentee came into the unencum-
710 bered title. The ultimate fee in the lands acquired by the United States after adoption of the Constitution, whether by cession from the States of the Union, by treaty with foreign Nations, or by conquest, was in the Government of the United States, but subject always to the Indian title of occupancy, and it could, and frequently did, convey that fee. When this Indian right of occupancy should be extinguished, and in what manner, whether by treaty, by Act of Congress, or by the exertion of force, were determinable exclusively by the political power; but no matter how long delayed, or how brought about, upon its extinguishment the grantee, previously owning only the naked title, came into the unencumbered fee.

By the Act of June 30, 1834, as construed by the Supreme Court in Bates v. Clark, 95 U. S. 204, all the territory with which we are here concerned was Indian country on July 2, 1864, and so continued until the Indian title had been extinguished, and no longer. Many laws have been enacted with exclusive application to Indian country, having generally for their purpose protection for the Indians, preservation of peace among the tribes and with the white men. Many treaties have been entered into with Indian tribes in Indian country having a like purpose. Much of this legislation and the regulations under it were quite

similar in character and identical in purpose with those relating to Indians upon reservations. Nevertheless the distinction between Indians in Indian country roaming, hunting, and fighting over their ancestral domain, and the Indians confined to reservations and more or less regulated in their lives and habits
711 by the Government through its agencies, as we commonly use and understand the term reservation, is perfectly plain and in a given case should not be difficult of legal determination.

Generally, in our history, the United States has dealt with the Indian tribes on the basis that they possess the attribute of nationality to the extent that treaties might be made with them under the treaty-making power. It has always been held, however, that the plenary power of Congress over Indian tribes and tribal properties could not be limited by these treaties so as to prevent repeal or amendment by later statutes either with or without the consent of the Indians; the tribes being regarded in so far as they were nations as dependent nations and the treaties with them not as contracts but as public laws which could be abrogated at the will of the United States. In 1871, however, Congress by Statute declared the intention thereafter to make the Indian tribes amenable directly to the authority of the laws of the United States by immediate legislation over them instead of by treaty as customarily theretofore done.

Coming now to a direct discussion of the legal questions involved it is to be observed, first, that the route of the railroad as prescribed by the Act of July 2, 1864, as above pointed out traversed the lands of the plains tribes between the Missouri River and the Rocky Mountains. It seems evident that Congress must have intended that the treaties in question did not interfere with its lawful power and its just right to grant a right-of-way and lands in aid thereof through this vast extent of Indian country which lay necessarily right in the path of the road. It must have supposed either that the treaties in question did not create reservations or if they did, it must have supposed
712 that these treaties did not create such Indian reservations as excluded the lands from the operation of the grant, or it must have intended if they did, that the treaties to that extent should be abrogated. It is inconceivable that the comprehensive language of the last clause of section 2 of the Act—"The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this Act, and acquired in the donation to the road named in this bill," would have been used except it was intended to apply that language to the Indian country necessarily to be crossed. One gets

the irresistible impression that the foregoing language should apply to this Indian country throughout its length and breadth wherever the road might be located, and wherever the grant might fall, rather than the particular and circumscribed language of section 3 excepting lands not "reserved, sold, granted, or otherwise appropriated and free from preemption or other claim of right or rights." The language of section 2 is entirely appropriate to cover the vast territory in question. The language of section 3 is quite inappropriate for that purpose, but is appropriate as applied to small portions of the public domain along the line of the road which might have been, at the time of the Act, or might be prior to definite location granted to individuals or reserved for Governmental uses. It seems to me impossible that the legal mind can receive any other impression of the significance of the two sections than this. In Buttz v. Northern Pacific Railroad, 119 U. S. 55, Mr. Justice Field declares this view, saying: "The provisions of the third section limiting the
713 grant of lands to which the United States had then full title, they not having been reserved, sold, granted, or otherwise appropriated, and being free from preemption or other claim of rights, did not exclude from the grant Indian Lands not thus reserved, sold, or otherwise appropriated which were subject simply to this right of occupancy. Nearly all the lands in the territory of Dakota and, indeed, a large, if not the greater portion of the lands along the entire route to Puget Sound on which the road of the company was to be constructed was subject to this right of occupancy by the Indians. With full knowledge of their title and its impediment to the use of the land by the company Congress made the grant with a stipulation to extinguish the title." And, again—"In our judgment the claims and rights mentioned in the third section are such as are asserted to the lands by other parties than Indians having only a right of occupancy."

In this view the arguments of counsel as to whether these treaties created reservations for the Indian tribes, or quasi-reservations, or whether they were treaties of peace and amity only, and as an essential or convenient particular thereof, a recognition of their ancient occupancy of the designated division of the public domain, are of not great importance. Whatever the technical effect of the terms employed, looked at in the abstract, it seems clear that it was not intended to limit the power of the United States to dispose of these lands, and to provide permanent reservations for the Indians whenever in the course of events it should seem best for both them and intending settlers to make such provision. To me, at least, it is clear that

the language of section 2 declares that power and policy for the purposes of the grant. Congress seems to have taken
714 the same view. Notwithstanding the Fort Laramie treaty peace amongst the Indian tribes did not result. Some tribes, indeed, continued throughout friendly with the whites; others were at continual warfare. It is said that reports to the Commissioner of Indian Affairs are full of accounts of massacres, Indian fights, and Indian campaigns. The Cheyennes, the Arapahoes, and the Sioux, in particular, had long and bloody conflicts with the whites. The Government had its hands full with the Civil War, and was not able to afford adequate protection to the settlers.

On July 20, 1867 (15 Stat. 17) Congress adopted an Act entitled "An Act to establish peace with certain hostile Indian tribes." The President was directed to appoint a commission to consist of three officers of the Army not below the rank of Brigadier General who, with N. G. Taylor, Commissioner of Indian Affairs, John B. Henderson, Chairman of the Senate committee of Indian affairs, S. S. Tappan and John B. Sanborn should have authority to call together the chiefs and headsmen of the bands then waging wars and conclude treaty stipulations with such tribes. By section 2 of the Act it was provided that the commissioners should examine and select districts of country having sufficient area to receive all the Indian tribes now occupying territory east of the Rocky Mountains and not peacefully residing on permanent reservations under treaty stipulations. Such district or districts when so selected, and the selection approved by Congress should remain permanent homes for said Indians, and no persons not members of the tribes should ever be permitted to enter without permission of the tribes interested except officers and employees of the United States.
715 It was expressly provided too, that the district or districts should be so located as not to interfere with travel on highways located by authority of the United States nor with the route of the Northern Pacific Railroad, the Union Pacific Railroad or with the proposed route of the Atlantic & Pacific Railroad by the way of Albuquerque. The commissioners were required to report their doings to the President of the United States including any treaty made and all correspondence and evidence taken by them. Besides the men appointed by Congress, General W. T. Sherman, General William S. Harney, General A. H. Terry, and General C. C. Auger served on the commission. The report is exhaustive, apparently prepared with great care and, pursuant to the Act, made to the President of the United States. Referring to the Fort Laramie treaty it is said, "These

Indians have never founded the title to their lands upon the treaty of 1851. They have looked upon that treaty as a mere acknowledgment of a previously existing right in themselves. The assignment of boundaries, they supposed, was merely to fix rights among the tribes—to make certain what was uncertain before. It is true, that by said treaty they 'recognized' the right of the United States to establish roads and military posts. But it is equally true that in lieu of this privilege the United States was to pay them $50,000 per annum for fifty years." And, also, "The Indian who had stood by and seen the stream of population pouring over his lands to California, Utah, Oregon, and Montana for so many years, began now, when thrown back by the Government upon his own resources, to seek some place where he might be secure from intrusion. But just at this moment, the war
716 of the rebellion being over, thousands of our people turned their faces toward the treasures of Montana. The stories in regard to its mines eclipsed those fabulous tales that frenzied the Spaniard in Mexico. The Indian was forgotten. His rights were lost sight of in the general rush to these fountains of wealth." For people, especially from the States nearest the frontier, were coming in to the Indian country and hostile contests, as always in such movements, were inevitable. The Union Pacific Railroad was under construction and surveys were being run, sometimes as already pointed out, under military protection, for the Northern Pacific. The time was at hand when the western flood of migration could no longer be held back. And so the time had arrived when public policy and the welfare of the Indians required the extinguishment of their title, not only or principally that the grant to the railroad company might attach as provided by section 2, but what was perhaps more important, that the settlement and development of the vast area might proceed. To that end the Indian right of occupancy was terminated and the bands retired to reservations. In some cases this was accomplished by treaty; in some by Act of Congress; in yet others by executive order, and in a few instances by military force in the protection of settlements. It is sufficient to say, additionally, only that the Indians' title was extinguished, and the way made clear to build the Northern Pacific road, and for its grant to attach in advance of actual construction, with the exception of certain reservations thus established, as that of the Crows by treaty of May 7, 1868.

Thereupon the grant was administered from the begin-
717 ning upon the theory that the treaties under consideration in this subdivision did not except the lands from the grant but that permanent reservations created before definite location

did. Thus through the Crow reservation of May 7, 1868, the company was required to pay the Indians for its right of way and as in that reservation the place lands were lost to the grant it was permitted to make lieu selections in indemnity limits. Had the grant been administered as the Government now says it should have been, the greater part, if not all of the indemnity lands, would have been at once exhausted, leaving little or nothing to supply the ordinary losses which only, as I think, they were intended to cover. It is not now possible, if this administration of the grant be held erroneous, to restore the situation as it was at dates of definite locations. Of necessity much of the indemnity land must have gone to actual settlers or have been otherwise disposed of so that it is no longer available for selection. To now overthrow the ruling of the land department, uniform for a half century, would result in an overwhelming loss to the company of lands which it had fairly earned under its grant, in place of which no other lands are available and for which it is called upon to make money reparation in a huge sum—a situation resulting from the action of the government itself—action unquestioned by any department of the government for more than fifty years.

I think in the second place it should require strong cogency of circumstances and perfect clearness of language to over-
718 come the foregoing considerations and to determine that these treaties have the result now contended for.

But looking at the circumstances of the Fort Laramie treaty, its purposes as contemporaneously stated, as well as the way it was understood and acted upon by both the red men and the white, one is lead to the same conclusion. I will not extend this report by quoting in detail. Suffice it to say that beginning with the instructions to the agents in charge of the negotiations, the letters of Colonel Chambers to the Missouri Republican written from day to day contemporaneously with the happenings, the speeches of some of the Indian chiefs, the report of the agent upon the treaty after its conclusion, the account of it by Father DeSmet—all conclusively point to the same thing, namely: That a treaty of peace was being negotiated by the United States, with all these prairie tribes, and among the tribes themselves—nothing more. As one means to that end the tribes were brought, with considerable difficulty as to some of them to be sure, to agree upon the territories, they and their fathers had traditionally occupied, or in certain instances had obtained by conquest. These were defined and put on a map. The United States recognized as theirs territories thus agreed upon. The Indians were to remain at peace with the white man and with each other, and not to encroach upon one another's

territory, except that they might continue to hunt in any territory where they had been used so to do.

The treaty itself, not only in its general scope and spirit, but by its specific language, speaks these purposes and these only, clearly and definitely. The first article discloses that the
719 nations had assembled for the purpose of establishing and confirming peaceful relations among themselves, and that they covenant and agree to abstain in future from all hostilities against each other, and to make a lasting peace. No other purpose for this great tribal gathering is stated either in this article or elsewhere in the treaty. By articles 2, 3, and 4 the right of the United States to build roads, military, and other posts within the respective territories of the nations is recognized. The United States binds itself to protect the Indian nations against the depredations of its people. And the Nations in turn agree to make restitution for any wrongs committed by any bands or individuals of their people on the people of the United States whilst lawfully residing upon or passing through their respective territories. By articles 6, 7, and 8 the Indian nations agree to sustain the head chiefs for their respective nations, selected by them, and through whom all national business will be conducted. The United States agrees to pay a stipulated annual sum with the right to withhold any portion thereof from any nation violating this treaty. There are no other covenants of agreements whatsoever. By article 5, "The aforesaid Indian Nations do hereby recognize and acknowledge the following tracts of country * * * as their respective "territories". Then, after defining the territories of each nation, it was declared that in making this acknowledgment and recognition any rights or claims they have to other lands are not abandoned, and that the right to hunt, fish or pass over any territory defined in the treaty is not surrendered.
720 Throughout this treaty the term "territories" and no other, is used to describe the homes of these Indians. The whole of this vast country is recognized and described as territories of the respective nations: and the term is descriptive of the ancient and traditional lands of the tribes—not as delimiting, much less as granting or establishing a new domain. The covenants by the Indian tribes are national and all in respect of their national territories—and the covenants of the United States are with them severally as nations and not others. 2 Kapler p. 594.

One living in the West and more or less familiar with Indian reservations and the administration of reservations, is at once struck by the entire absence of the usual paternalistic paraphrenalia. No agent is provided for, nor physician, nor police, no agency building or warehouse, or store, or residence for physician,

carpenter, blacksmith or miller. No schoolhouse or mission house, nor provision that the agent shall induce or require the children to attend school.

Again, in the usual treaty establishing a reservation proper in some form or another the United States agrees that a certain territory shall be reserved or set apart for the use of the Indian. In no such treaty that I have seen is there any recognition or acknowledgement, either in terms or idea, of formerly existing territory of an Indian nation. And, of course, nothing of that sort is present when the reservation is created by Congress or by the President.

As good an illustration as any is the Crow treaty of May 7, 1868; likewise concluded at Fort Laramie—2 Kapler, 1008.

721 By this treaty an Indian reservation was created. The lands within its limits were set apart and reserved strictly within the terms of section 3 of the Act of July 2, 1864. As this reservation was established prior to a map of definite location for this part of the line, the railroad company obtained no lands in place through the reservation, but did have the right to select indemnity lands in lieu. Moreover, as the losses on account thereof occurred after July 2, 1864, such lieu selections might be made in the second indemnity limits. And the grant was so administered. I conclude that no reservation coming within section 3, were created by this treaty and the territories of the tribes remained Indian country within section 2.

The Blackfoot did not sign the Laramie treaty, nor do they appear in the title, but a territory is recognized as theirs in the body of the treaty. It is said that owing to travel delay their chiefs did not reach the place of assembly. I think that somewhere in the accounts it is stated the treaty had been previously prepared in Washington, but I am not able to find it. If this be so, and it is inherently probable, it is likely the agent in charge did not feel at liberty to alter the terms of the treaty as written.

However, on the 17th of October, 1855, at the council grounds on the Upper Missouri, near the mouth of the Judith River, in the territory of Nebraska a treaty was concluded with them and other tribes—Kapler, p. 736.

This treaty discloses that the nations parties to it will abstain from all hostilities whatsoever except in self-defense against the Crows. The Blackfoot nation consents and agrees that a certain described part of the territory-"recognized and defined

722 by the treaty of Laramie as Blackfoot territory" shall be a common hunting ground for 99 years, where all Indian parties to this treaty may enjoy equal and uninterrupted privi-

leges of fishing, hunting, grazing, curing meat and dressing robes; but that none will establish villages or in any way undertake to exercise exclusive rights within ten miles north of it. The last proviso to Article 3 of the treaty declares that the rights of the western Indians to a whole or a part of the common hunting grounds derived by occupancy and possession shall not be affected by this article except so far as such rights may be determined by the Laramie treaty. The Court of Claims in the case of the Blackfoot Nation and others vs. the United States, decided on April 10 of this year, said that this hunting ground was not Indian territory in a legal sense because no one tribe possessed exclusive right of occupancy. But this cannot be sound for two reasons; first, what is Indian territory does not and cannot in the very nature of Indian occupancy depend upon whether the country is occupied exclusively by one tribe or in common by several. By the Act of June 30, 1834, as construed in Bates v. Clark, supra, all parts of the United States west of the Mississippi, not within the states of Missouri, Louisiana or the Territory of Arkansas to which the Indian title had not been extinguished is Indian country; the court saying: "The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as Indians had title to it, and no longer." Second, not only did the treaty not undertake to extinguish the Indian title in the common hunting ground, in whatever tribe or tribes it rested, but by the proviso above stated, this title is expressly preserved except so far as otherwise determined by the treaty of Laramie. I cannot, therefore, accept this remark as a correct statement of law. I think it was Indian country and so remained until the Indian title was subsequently extinguished, and the lands restored to the public domain. The court seems to have had in mind the second proviso to Article 3 forbidding permanent settlement or other Acts of exclusive ownership for the period named. But the last proviso seems clearly to limit the effect of that language if in any event it could have that construction.

723

The remaining Articles of the treaty except Article 8 calls for no particular mention. The treaty does not differ in legal effect from the Laramie treaty. It does not establish a reservation for the Blackfoot tribe. It only recognizes and declares its territory in the same way as did the Laramie treaty to the tribes signatory thereto.

Article 8 on first reading may appear to introduce an element the absence of which I noted in the Laramie treaty as having a tendency to show no reservations were there created. If the effect

of the Article were so, however, it would not affect the question sufficiently to alter my views. But a careful reading of the Article shows its purpose and effect not to be that of somewhat similar provision in treaties or Acts establishing Indian reservations. The provisions of the Articles are disclosed to be for the purposes of establishing thoroughfares throughout the country and the better to enable the President to execute the provisions of the treaty. For these purposes and these only, the
724 nations and tribes signatories to the treaty, consent that the United States may build roads, telegraph lines, military posts, agents' houses, schools, and so on. The United States does not covenant or agree to do so. Whatever was done in those respects was to be done for the convenience of the United States, not for the advantage of the Indians nor as a consideration to them for cession of territory.

I conclude, therefore, that no reservations for the Blackfoot tribes to bring its territory under Section 3 of the Act of July 2, 1864, was created by this treaty; but that its territory continued to be Indian country until subsequently its status was altered.

Congress, the President and the Interior Department seem to have entertained this view of the treaty. On July 5, 1873, President Grant, by executive order set apart a reservation for the Blackfoot and other Indians and directed that all lands within its boundaries be withdrawn from entry and settlement. By Act of April 15, 1874, Congress set apart a reservation for the Blackfoot and the other tribes included in the executive order of July 5, 1873. The reservation thus created was somewhat more restricted than the one created by that order, and on August 10, 1874, President Grant restored the excess to the public domain. On April 13, 1875, the President added some additional lands to the Congressional reservation but on July 13, 1880, President Hayes restored a portion of these to the public domain.

The map of definite location for this part of the road was filed in 1882. At that date there was a reservation and the railroad company could not obtain any lands falling within
725 its boundaries, but for the loss it had a right to make lieu selections in second as well as first indemnity limits. All lands outside the reservation passed under its grant. The grant was so administered by the department and has remained unquestioned for more than a half century. As to these lands as well as to those falling under the Fort Laramie treaty it is now impossible to restore the status quo.

I do not comment on the lands within the common hunting ground because it is conceded that these were not reserved and, notwithstanding the apparent scope of the complaint, all claims in respect of these lands is waived.

Butts v. Northern Pacific Railroad Company, 119 U. S. 55, is pressed upon my attention as determinative of the questions arising under these treaties, while on the other hand, it is urged that what is said on the point is dictum; and that in any event the case is not authoritative because the general route withdrawals upheld in the case has since been overruled, and, that out of the case, the opinion does not uphold the doctrine declared by the court. It is further urged the Indian title involved was not of the same character as that of the titles arising out of the Laramie and Blackfoot treaties.

This seems to call for a consideration of the case. The Indian title was that of the Sisseton and Wahpeton bands of the Sioux. The earliest treaty which I have seen with these tribes is one of July 23, 1851. Kapler, p. 588. I presume that prior to that treaty their occupancy of their territory was what it had always been since the United States had owned the country and, hence, within the Act of 1834 the territory was Indian country.

726 These bands were not parties to the Laramie treaty of September 17, 1851, nor were their bands included in it. It was concluded at Fort Laramie and is sometimes referred to by that name. These bands ceded to the United States all their lands in Iowa and certain of their land in Minnesota. The occupancy of the other portion of their territory was not in anywise affected. This should be borne in mind in considering a treaty concluded with the bands on February 19, 1867, at Washington. Kapler, p. 596. By this treaty a reservation was created for one band of these Indians known as the Lake Traverse reservation and another known as Devils Lake reservation for a second band. The bands ceded to the United States wagon roads, railroads, and telegraph lines not only through these reservations, but through all other lands claimed by them; otherwise their title to these other lands is not affected. Under an Act of Congress June 7, 1872, the Secretary of the Interior appointed commissioners to treat further with these Indians. By an agreement of September 20, 1872, the bands proposed to sell and cede to the United States their lands not included in the reservations set apart by the treaty of 1867. Kapler, p. 1057. This agreement was communicated to the Secretary but whether presented to the Senate for ratification does not appear. However, by the Indian appropriation Act of February 14, 1873, an appropriation was made to meet the first installment of payment to be made to the bands under the agreement, conditioned that an amended agreement should be executed.

Thereupon the same commissioners concluded an amended agreement with the bands on May 2, 1873, by which certain

727 Sections of the original agreement were stricken out.

These stricken sections in no way affecting the proposal to sell and cede the lands. This amended agreement was approved by Congress on June 22, 1874.

In the meantime, and on February 21, 1872, the company filed its map of general route, and withdrawal from sale was ordered by the Commissioner of the General Land Office of date of March 30th of that year. On May 26, 1873, a map of definite location was filed passing through the land in controversy. Thereupon the Commissioner projected the lines of the grant limits and forwarded a diagram thereof to the local land office. A subsequent government survey shows the land to be located in section 7.

One Peronto, Buttz' predecessor in interest, settled upon this land October 5th, 1871, being qualified with the intention of preempting, and on August 11, 1873, presented to the local land office his declaratory statement which was refused for the reason that the land belonged to the railroad company. It was contended for Buttz that on July 2, 1864, the lands in controversy were Indian lands and therefore did not pass by the grant to the railroad company, unless and except the Indian title had been extinguished prior to filing a map of definite location, and as this had not been done until after that map was filed Buttz was entitled to the land. The court held: first, that the fee passed by the grant, subject to the right of occupancy of the Indians, and when that right was terminated, the unencumbered fee vested on filing a map of definite location. Second, that in com-
728 pliance with the pledge of section 2 the United States took steps by the treaty of February 19, 1867, to obtain a right to build railroads and telegraph lines across the lands of these Indians, which right inured to the benefit of the railroad company; that the agreement of September 20, 1872, while in form a proposition to cede and not an actual cession, became effective as a cession when the modified agreement of May 2, 1872, was approved on June 19 following. And as the Indians had retired to the reservations provided for them by the treaty of 1867, immediately on executing the original agreement, their right of occupancy was abandoned and when they subsequently accepted the consideration provided, it could not be resumed. Third, that if the foregoing view was not correct, and the right of occupancy was not to be deemed terminated till the amended agreement was ratified by Congress in June 1874, the result would not be changed, as the right of the company to the lands granted did not depend upon the extinguishment of the Indian right of occupancy prior to the filing of a map of definite location. Then follows the language I have quoted above and which is said to be dictum. Fourth, that till the Indian title was out

of the way Peronto could initiate no preemption right to the land. And, Fifth, that by his continuous residence after any date on which the Indian title had been estinguished he did not acquire any rights for the map of general location had been filed before the Indian title had been extinguished, and when this occurred the unencumbered fee passed by the grant. It is this portion of the opinion that is said to have been overruled by Nelson v. the Northern Pacific Railway Co., 188 U. S. 108.

729 I held that this case does authoritatively establish the doctrine that all lands in the occupancy of the Indians, to which they had no other title, passed under the grant to the railroad company, and that when this right was extinguished the unencumbered fee vested in it; that whether this right was terminated before or after filing of map of definite location does not affect this result, except that the company could not build its road through Indian territory or enter upon the lands granted till such time as the political power of the United States had extinguished the Indian title. This question was squarely in the case and what was said is not dictum. I hold, however, that this case does not aid us to determine the effect of the Fort Laramie Treaty, or that with the Blackfoot, for the reason that on July 2d, 1864, the status of the Indian lands then involved were not affected by treaty or otherwise, and were, in consequence, concededly Indian country, while the question here is had the status of the lands falling within the one or the other of these treaties been thereby changed. Conceding the doctrine of general route withdrawals has been overruled, I hold the authority of the case is not otherwise thereby affected.

It is necessary at this point to give consideration to the case of the Indians of the Fort Berthold Indian Reservation v. The United States, decided by the Court of Claims on December 1, 1930. The case came before that court under a special jurisdictional Act of Congress directing a determination of any and all claims the Indians might have against the Government under any treaties, agreements or laws of Congress or for failure

730 of the United States to pay any money or other property due. This is a sufficient statement of the Act for any question decided by the Court applicable here. I think that the Court certainly held that the Fort Laramie Treaty did in effect create a reservation for these Indians to the extent that it gave them a right to be compensated when the Government reduced this territory by the successive executive orders of May 18, 1868, April 12, 1870, and July 13, 1880. It seems to me, too, that this holding was within the issues, for the question was presented by the petition and the judgment that was rendered was based in

fact on that holding. The Government contended that the Indians derived no rights from the treaty and that the United States thereby recognized only the ancient rights of these Indians. As the Act under which the case was brought confined the Court to a determination of claims growing out of treaties, agreements, or Acts of Congress, I suppose the Court found it necessary to hold the Laramie Treaty did confer rights in order that it might do justice to these Indians. It was probably felt that the Act did not empower it to give judgment for a surrender of only the original right of occupancy. It is difficult for me, at least, to understand precisely what the Court did hold. But I have reached the conclusion that the case does not go beyond what was necessary to give the relief adjudged. And notwithstanding some of the language, the opinion should not, I think, be regarded as determining that the terms of the treaty took it out of section 2 of the grant to the railroad company. That question was not, of course, before the Court, nor was it necessary to go so far for the decision of any question in the case.

731 If I am mistaken about this and the case must be construed as determining all that Mr. McGowan claims for it, I should not feel that I am bound by it as it is not a controlling authority and it does not appeal to me as a precedent to be followed.

The demurrer to this subdivision is sustained.

I hold, also, that the plea of estoppel in the sense I have heretofore explained it should be sustained. The administration of the grant for fifty years, the acquiescence of Congress, of the Executive and of the Legal department in that administration, and the impossibility now of restoring the grant to its original situation and the consequent injustice that would otherwise result, seem to me to demand such holding.

732

XV

CONTRACT WITH TELEGRAPH COMPANIES

This contract provided, briefly, for the construction of the railroad company's telegraph lines upon its right of way by the telegraph companies; made various provisions as to keeping them in repair, compensation, and so forth, and provided in general fashion for the companies to send commercial telegrams arising on the line, and that the railroad company should, under certain conditions, provide office room for the telegraph companies, and makes a rather detailed regulation for the division of the earnings between the railroad and telegraph companies.

It is possible, by critical analysis of this contract to find in it certain provisions which, under the charter of the railroad company, is ultra vires its powers. As to other of the provisions they were entirely within its powers. The company certainly had a right to construct its telegraph line by contract, as it had a right to construct its railroad. Whether the various provisions touching the operation of the telegraph lines are all within its powers or not, some of them clearly are. I can see no possible reason why the railroad company might not have agreed with the telegraph companies to furnish quarters for their instruments, and agents at stations on its road. All of this was for the convenience of the public and aided the railroad company in the discharge of its duties with respect to the receipt and trans-
733 mission of commercial telegrams. So far as the contract undertook to put the operators of the railroad company under the control and direction of the telegraph companies it probably was a literal transgression of the railroad company's powers. Substantially, however, no harm was done, it evidently being contemplated that by reason of their skill and experience in the operation of such lines the railroad operators would be able to serve the public to better advantage. I think, on the whole, the objectionable features of this contract are certain mere incidental details, and which called for no interference by the Government. For reasons sufficient to Congress it enacted the Statute of August 7, 1882 (25 Stat. 382), requiring all railroad and telegraph lines to which the United States had granted subsidy, or other aid, to construct, maintain and operate all such telegraph lines by their own respective officers and employees, and to exercise by themselves alone all the telegraph franchises conferred, and obligations assumed under the Acts making grants. Congress plainly considered that by the enactment of this measure it had corrected any and all evils which might have grown out of the practice such or similar to that exhibited by this contract. I think that by this Statute Congress intended to exert no further powers or make further complaint of any sort concerning what had been done in the past. It was content to regulate what should be done in the future. In any event, however, by the terms of the contract no time limit was fixed for its expiration. It is stated in this subdivision that it remained in full force until May 1st, 1880. There is no allegation as to how it
764 was terminated on that date, and no complaint made in respect of this contract subsequent to that date. Presumably, therefore, the contract was terminated in some manner on May 1, 1880. In respect of this contract it is alleged that the failure of the railroad company to construct, furnish, maintain

and control its telegraph lines was a breach of the terms of the granting Acts to it, and notwithstanding such breach large areas of land have been conveyed to the company by patent, or otherwise, through the inadvertent error and mistake of the officials of the land department. It is impossible to determine from the allegations of the bill what relief the Government thinks it is now entitled to because of this supposed breach of the Act of July 2, 1864, and I am not helped by Mr. McGowan's argument. He, of course, alleges that the contract was a breach of the Act and cites to the point the case of A. & B. Telegraph Company v. Union Pacific Railway Company, 1 Fed. 745. He concludes that to earn the grant the company must have constructed and maintained, not only the railroad, but the telegraph line; that there was no way of pro-rating the lands to either one or the other; that it is immaterial whether any pecuniary loss to the government be shown, but that the government is entitled to show the violation of its duties under the grant, and have it considered in connection with the claim of affirmative relief. But what effect it should have is not suggested, nor what effect could at this date be given it. The cited case was a suit by the telegraph company against the railway company to restrain the latter company from, on its own motion, re'cinding certain contracts with the plaintiff, and from taking possession of the plaintiff's
735 telegraph lines. These telegraph lines were constructed under two contracts between that company and the Union Pacific, the terms of which it is not necessary to state. It was held in that case that the contracts between the railroad company and the telegraph companies were ultra vires the railroad company in that, first, they transferred property necessary to a performance of its public duties, and, secondly, because they attempted to transfer the franchise to operate the telegraph line, and to fix and collect tolls. It was further held that notwithstanding all this the railroad company could not re'cind the contract and on its own motion take possession of the lines without first returning the consideration received and that rescission could be had only through legal proceedings. An injunction was therefore granted with the result that the company was at liberty to institute legal proceedings either by cross-bill in the cause, or otherwise, to set aside the contracts upon return of the consideration and to settle and adjust upon principles of equity, the accounts between the parties.

Assuming, for the present, that the contract between the Northern Pacific and the Telegraph Companies was unauthorized as alleged, still as between them it could only have been terminated and finally adjusted by a judicial procedure, or by mutual agree-

ment. It was in some manner disposed of and ceased after the first day of May, 1880.

During the continuance of the contract doubtless the Government could have brought the parties into court, and if it
736 was found beyond the powers of the railroad under its charter, could have dissolved the agreement and required the railroad to operate its own telegraph line. This is precisely what the telegraph and railroad companies did more than fifty years ago, and in that aspect this contract was a closed chapter. The Government might, of course, if it conceived the contract justified such action, have brought an appropriate action to forfeit the franchise. It is scarcely conceivable that a court could have been found to have entered such a judgment, for while it is clearly the law that where corporations fail to perform the duties which they are created to discharge, or where they do unauthorized acts, the state has a right to wrest its franchise from the offending corporation: this, however, the courts will not do where it is patent that the law has provided other sufficient remedies for the correction of the evil, and this rule is applied with great stringency where the corporation is created for the purpose of public utility which it is the policy of the statute to encourage and foster. The courts will never enter a forfeiture decree except where it is made clearly to appear that there has been some act of power whereby the corporation failed to fulfill the purposes of its creation or some act of misuser or non-user which are of the essentials of the contract between sovereign and its creature and involving, therefore, essential and fundamental public interests. It is inconceivable that any term of this contract could have brought the company within the operation of the rule, but even if it might be supposed dissolution could have been enforced, what a perfectly preposterous remedy it would have been and thus at the very beginning of this project to
737 throw the whole enterprise to the winds. However, the Government did nothing of that sort, and for more than fifty years has disregarded whatever irregularities may be found in the contract, and so that matter should be deemed as ended.

By no possibility could the Government have forfeited the grant of land by reason of this contract, whatever interpretation may be put upon it. The only right to forfeit, as I have pointed out, arises from the condition subsequent stated in section 8. I think the construction of the telegraph line within the time limits of this section was as much a condition subsequent as was the construction of the railroad. If under the facts in this case Congress might have, or may now forfeit under this section it would thereby exercise the only remedy presently possible to

it. If, however, as I hold later on in this report, it had waived the right to forfeit, that waiver, of course, goes to the telegraph line as well as to the railroad and the whole matter should, therefore, be out of the case.

This contract and the operations of the companies under it for the ten-year period (1870–1880) can have no possible effect upon the adjustment of the land grant of the Northern Pacific railroad. I, therefore, sustain the motion to dismiss this subdivision.

738

XVI

UNAUTHORIZED WITHDRAWALS: SUBDIVISION XXXII.

Prior to the decision of Nelson v. Northern Pacific Railway Company, 188 U. S. 109, whenever the company filed in the office of the commissioner of the General Land Office a map of general route for any portion of its line that officer withdrew from sale or entry the odd numbered sections within the place limits of the grant on either side of the line thereby indicated. That case determined that as between the company and one who had occupied a tract of land with the purpose of entering it as a homestead before survey and before the map of definite route had been filed in the office of the Commissioner but after the map of general route had been filed and the lands thereupon, withdrawn, the order of withdrawal was unauthorized, and the settler should have the land.

It is alleged in this subdivision that this decision came too late to cure the ill effects of the practice, as maps of definite location had been filed and withdrawals improperly made thereunder of thousands of acres embraced in the general route, with the practical consequence that settlers were excluded from the withdrawn lands in the interim to the great advantage of the railroad company and corresponding loss to the United States.

It is further alleged that the company filed with the commissioner various maps of definite location and that thereupon the Secretary of the Interior laid down the place and indem-
739 nity limits of the grant and withdraw from sale or entry the odd numbered sections in the indemnity limits as well as those in place limits. Such withdrawals were held unauthorized in Hewitt v. Schultz, 180 U. S. 139, but it is said by virtue of the unauthorized withdrawals before the date of this decision the company had received lands and values to which by the terms of the grant it was not entitled, to the injury of the United States.

What advantage accrued to the railroad company, or what injury to the government because of one or the other erroneous administrative withdrawals is not alleged in the pleadings. But in argument it is said that as no definite quantity of land was granted—the amount available under the grant was from time to time subject to diminution by disposition to other railroads, and by settlements in the limits of the grant, and the grant would be satisfied whenever the company had obtained all available lands granted, either in primary or indemnity limits, and when this happened the obligation was fully discharged; that under the law as afterwards determined settlers were entitled to enter and purchase the land and the Government would therefore have received the price for the lands fixed by law; that by the erroneous withdrawals the plaintiff not only lost the cash it would have received from the settlers but its public policy with respect to the public domain was defeated.

This is the whole scope of the argument. In the first place I cannot see at all how the erroneous construction of the grant by the officials of the government charged with its administration could under any circumstances prejudice the rights of the
740 railroad company. It is not alleged that such withdrawals were procured by the fraud or other improper influence of the railroad company, or at its solicitation. The withdrawals were made by the Government and not by the railroad company; could not have been made by any one but the Government's land department.

In the next place I cannot see how the Government was, in point of law, injured, or by any possibility the railroad was advantaged. It is not charged it received any lands it was not entitled to receive, or in advance of the date it was entitled to receive them. The Government was obliged to convey to the company all available lands in place limits, and where required, in the indemnity limits, and when these lands ultimately were conveyed admittedly at the proper time, and after they had all been earned the transaction was closed in entire conformity to the terms of the grant and to the intention of Congress. Neither can it have any possible relevancy to the adjustment of the land grant. Upon that adjustment, as I have said before, there are only three elements to be considered—first, the measure of the grant, second, whether the railroad company has received that measure, and, third, whether it has earned it. These lands, as all others conveyed to the railroad company go to make up the sum total of lands received by it. The withdrawals can have no possible effect upon that question. The motion to dismiss this subdivision is sustained.

741

XVII

SELECTIONS IN OREGON & CALIFORNIA LAND GRANT LIMITS UNDER THE ACTS OF JULY 1, 1898, AND OF MARCH 2, 1899

By subdivision XXXVI it is alleged that prior to the decision of the Supreme Court in the Forest Reserve case, 256 U. S. 51, the Department had held that, in the absence of a deficiency ascertained and approved by the Secretary, lands within the indemnity limits of grants to railroads were subject to withdrawal by the United States for Governmental purposes, and to disposition to third persons, if on the dates of the withdrawal and of the disposition, valid indemnity selections of these lands had not been made. That by Act of July 25, 1866 (14 Stat. 239) Congress granted lands to the Oregon & California Railroad Company in aid of the construction of a railroad from Portland to the California line, and that thereafter primary and indemnity land grant limits were established for the benefit of the company: That prior to the ascertainment of the deficiency by the Secretary of the Interior in that grant, and prior to the filing of valid indemnity selections by that company, but at a time when the grant was in fact deficient, the Secretary of the Interior, through error and mistake and without authority, allowed the Northern Pacific Railway Company to select certain odd numbered selections within the indemnity limits of the grant to the Oregon and California Company under the provisions of the Act of July 1, 1898 (30 Stat. 620) and the Act of March 2, 1899 (30 Stat. 993), and issued patents for the lands. Thereafter the Northern Pacific Company sold the lands to third

742 persons when it was not entitled to the receipts therefrom inasmuch as the Oregon and California Company was entitled to the lands. It is thereupon alleged that the United States is entitled to relief from this error for the purpose of the adjustment of the grant as prayed by the bill.

The lands in question in this subdivision were not indemnity selections, but were selected under the exchange provided by the Acts of July 1, 1898, and March 2, 1899. Under those Acts it had relinquished lands and had selected these instead. It cannot make any difference whether the United States violated its obligations to the Oregon & California Railroad as held by Judge Wolverton in the accounting suit between the Government and that company.

The only material thing is that, having authority to select lands, the Northern Pacific selected these lands in partial exchange for those it had regranted to the United States under the Acts of Congress referred to, and the United States con-

veyed the lands thus selected. By what right the Government conveyed and what other of its obligations it disregarded in making such conveyance is wholly outside any question here. The Oregon & California Railroad Company is not asserting a right to the lands. It is not averred that that company has ever asserted its right, but, on the contrary, it is expressly averred that the United States was required in the accounting suit with the Oregon & California Railroad, to account to that company for these lands. The only relief claimed by this subdivision or in the bill with respect to this subdivision is that the respective rights and obligations of the Government and the Railway Company may be, by an accounting and otherwise,
743 ascertained and adjudicated in this suit.

The underlying thought of counsel's argument seems to be that as the Land Department is without authority to appropriate lands in indemnity limits to other purposes so long as the grant is deficient, that therefore the Government could not rightfully convey those lands to the Northern Pacific in discharge of its obligations under the exchange Acts pleaded. It seems to me, however, that it is not at all a question whether the Government has violated its obligations to the Oregon and California road. That matter seems to have been disposed of long since. Nakedly the question is this, and this only: The United States owed to the Northern Pacific a certain quantity of land and in part discharge of that debt conveyed the lands in question to which it had the legal title. Had it not conveyed these lands it must have conveyed others of an equal acreage. As the title of the Northern Pacific to the lands it conveyed to the Government is not attacked, so the title of the Government to these lands is not open to attack. The United States conveyed what it owed and no more, and the Northern Pacific received its due and no more. The quantity of land which the railroad company was entitled to receive under its grant was neither increased nor diminished by the transaction, nor is the quantity which it has received. I am unable to find any pertinency to this case in the matter of this subdivision and therefore sustain the demurrer.

744 XVIII

THE FIRST PROVISO OF THE JOINT RESOLUTION OF MAY 31, 1870

Subdivision XIII relates to the first priviso of section 1 of the Joint Resolution of May 31, 1870. That proviso is in these words:—"That all lands hereby granted to said company, which shall not be sold or disposed of, or remain subject to the mortgage by this Act authorized, at the expiration of five years after the

completion of the entire road shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding $2.50 per acre." It is alleged that the five-year period referred to in that proviso terminated on July 4, 1884, and on that date there were in the limits of the Northern Pacific grant millions of acres of lands which should have been open to settlement and pre-emption under that proviso, and the failure of the company in that regard was a breach of the contract contained in the Act of July 2, 1864, as modified and supplemented by the Joint Resolution, and was in defeat of the policy of the United States with respect to the disposition of its public domain as declared in the Resolution. What injury was suffered by the Government in consequence of this failure is not pointed out and no remedy that it may now have or ever did have in respect of this failure is suggested and no relief whatever based upon it is prayed for. In argument it is said only that it was a breach of the condition of the grant and that therefore under the maxim of coming into equity with clean hands it is to be considered with other derelictions of the company in
745 determining what rights on the final adjustment of the grant should be accorded to it. I have heretofore put this contention to one side as applied to the other questions and the rule cannot be different here.

But as the meaning of this proviso is argued at great length and with much ability, it seems desirable to examine the terms of this proviso to determine precisely its construction. The opening phrase—"That all lands hereby granted" is said to include as well lands theretofore granted by the Act of July 2, 1864. I can see no reason why these words should not be given their direct and natural import. I think the phrase means precisely what it says. It certainly requires much ingenuity to put into the language "hereby granted" a meaning covering all lands theretofore granted. By the Resolution a distinct and additional grant of lands was made to aid in the construction of a then thereby authorized line from Portland to Puget Sound. The authority to build that line had its origin solely in the Resolution. It was not authorized by the Act of July 2, 1864. I have endeavored to follow the detailed and somewhat refined reasoning of counsel on both sides. But to me it seems a simple question. The resolution authorizing the building of a line between Portland and Puget Sound and granting lands in aid thereof, then enacts: "Provided, that all lands hereby granted" shall be subject to certain conditions; and to me, at least, it is clear that those conditions relate to the lands thereby granted and to none other.

The legislative history of the Resolution renders any other view impossible. So much of this history as it is permissible

to consult discloses that repeated efforts were made
746 in both houses to so phrase it as to include the lands granted by the original Act. All amendments to that end were voted down. I shall not review this legislative history in further detail. I conclude that the phrase "hereby granted" means the lands granted by the Resolution.

Some question is made as to whether the indemnity limits to that grant and the second indemnity limits created come within the term under discussion. While it is true for some purposes that lands in indemnity limits are not granted lands, I do not think that principle has application here. Briefly stated this phrase includes not only the place lands granted but equally any other lands authorized to be selected to make up for losses to the grant in place, and that whether in first or second indemnity limits. All lands to which the company derives its title from the Resolution, either primarily of by lieu selections secondly are lands "hereby granted" within the language we are considering.

The next clause of the proviso "which shall not be sold or disposed of or remain subject to the mortgage by this Act authorized at the expiration of five years after the completion of the entire road—shall be subject to settlement and pre-emption like other lands," gives me more difficulty. In any possible view it is not grammatically construed. Any attempt to apply to it rules of grammer is futile. In quoting it I have purposely left out the punctuations. But, however punctuated, and for the purpose of bringing out whatever view of it, the bad grammer is still there. At a first reading its meaning seems clear enough that all land not sold or disposed of or subject to the mort-
747 gage, shall be open to settlement. I do not think anyone reading the Resolution as one ordinarily reads a Statute, would ever get the idea that it means anything different. It takes considerable refinement and speculation before one wakes up to the idea that some other meaning is hidden in the phrases. I feel very strongly that as to this clause "It is better to adhere to a plain, common-sense interpretation of the words" * * * "than to apply to them a refined and technical and grammatical construction. It is not always safe to assume that the draftsman of an Act understood the rules of grammer." Sutherland Sec. 259. Moreover this construction accords with the obvious purpose of Congress. It is to be remembered that it had become apparent if the road was to be built at all the necessary funds must be raised by the sale of bonds secured by mortgage. Jay Cooke & Co. had become interested and it was the intention by this Resolution to authorize a mortgage so as to make salable the bonds to be issued—not to hamper this sale by provisions that

would raise questions. It seems to me fairly clear that Congress did not intend to say to the Company you may mortgage but if the mortgage is not paid off in five years after completion of the road you must release to entrymen at $2.50 per acre the entered lands—that would mean, of course, the more desirable ones, the more valuable, and might leave only the worthless. Again there was no provision that the mortgage holder should release land to the settler, no provision that the mortgage should contain a clause to that effect—in short the whole scheme for the legislation and of the legislation discountenances any intention to make the authorized mortgage subject to the settlement provision.

748 It is further urged that but one mortgage was authorized by the Joint Resolution of May 31, 1870. That when that mortgage was executed the power of the company in that behalf was exhausted. That when that mortgage was foreclosed or released by the reorganization proceeding of 1875, there remained in the company no power to make another; and, hence that at the period of five years after the completion of the road, or five years after the date it ought to have been completed, no valid mortgage remained on the land, and it was therefore open to settlement in any event, and whatever may be the conclusion as to the meaning of the clause in question.

This argument is thought to be amply sustained by the peculiar phraseology of the Resolution. It speaks, so runs the discussion, only in the singular. Bonds are to be secured by "mortgage"; by the proviso "remain subject to the mortgage by this Act authorized"; and that nowhere in the Resolution can there be detected an intention to authorize second mortgage, or a third, no matter what the need, nor how strong may be the argument ab inconvenienti for the authority. And further, the argument proceeds, the mortgage must have been a single one, not one on the Missouri Division, and another covering another division, and yet a third over the whole line.

This is very strongly put by counsel and is impressive. It does not seem sound to me, however, It must be borne in mind that the right to mortgage one's holdings is an incident of ownership. I speak now of the granted lands only. A different rule may govern the railroad proper and its right of way.

749 The necessity for Act of Congress arose from the inhibition in section 10 of the Act of July 2, 1864. That section enacts all the people of the United States shall have the right to subscribe to the capital stock of the company until the whole capital is taken up; and no mortgage or construction bonds shall ever be issued "on said road" or mortgage or lien made in any way without the consent of Congress. It is not

necessary to determine whether this language includes the land grant or only the road and its right of way. I think the consent language of the Joint Resolution was intended to be as comprehensive as the inhibition; was intended to withdraw the inhibition. That, whereas the original Act incorporating the company disempowered it to mortgage, the Joint Resolution intended to restore to the Company the power it would have had but for section 10. The language is in the singular because it is in the abstract. It in terms authorizes bonds to be issued—something not forbidden by section 10—and then authorizes the company to secure the same by mortgage. There is no restriction on the number of aggregate amount of the bonds, and no requirement that all must issue at the same time. But whenever and in whatever amount bonds might be issued a mortgage, and I think mortgages, might be executed to secure the issue. I cannot believe that Congress intended to say that when the first mortgage fell due either by lapse of time or default in some condition, the company was to be helpless to save the enterprise. Neither do I think Congress intended to so legislate that if at some future time it could retire its bonds by placing others on better terms the company was not authorized to do so. I do not think
750 Congress intended to retain supervision of the financial operations of the Northern Pacific Railroad Company. I do think it did intend to alter the policy against mortgaging declared in the original Act, in view of changed conditions and of the necessities of the project so as to permit it to go on. And I do think the mortgage authorization of the Joint Resolution should be read as the expression of the change.

All the foregoing, aside however, Platt v. Union Pacific Railroad Company, 99 U. S. 48, seems to dispose of this subdivision. The Court construing the preemption clause of the Union Pacific grant, in substance for all purposes now under consideration, identical with this clause of the Joint Resolution, and along with it a clause in the mortgage on the lands of the Company, said: (pp. 62–63) "What are thus stipulated to be observed and strictly and faithfully to be carried out and fulfilled are the provisions of the Acts in all that concerns the sale and disposal of the lands. They are matters to be carried out and strictly fulfilled—duties to be performed by the company, and duties which concern the sale or disposal of the lands. Carrying out and performing a provision implies action. But the Acts of Congress contain no provision respecting the sale or disposal of the lands that requires action, that is, something to be carried out and fulfilled, except the implied duty of devoting the proceeds of sales or dispositions strictly and faithfully to aid in the construction of the road.

The provision that at the expiration of three years from the completion of the road the unsold or undisposed of lands should be open to preemption, was in its nature not one to be
751 "strictly and faithfully carried out and fulfilled" by the company. The right to preemption of whatever might be left, for preemption was a matter with which the company had nothing to do—in relation to which they had no duties to perform, and only a right to the price paid by the preemptor."

This language is, in my opinion, not dictum as suggested by counsel. The question was in the case, had been argued by counsel in the brief of the Government, and the Court decided it. It is doubtless true that the Court might have declined to determine this question and have put its decision solely on the other point. The determination of all questions raised in a cause does not render one or the other dictum. That only is obiter which is not in the case and is, hence, not before the Court.

But if, strictly speaking, what the court held on this point might be thought to go beyond what was necessary to determine the case, the doctrine comes to me with so much force of authority, even as mere dissertation if no more, the reasoning is so cogent that I deem it quite controlling. Quoting further from pp. 64–65: "The principal objection urged against the interpretation we have given to the words 'sold or disposed of' is, that it is repugnant to the governmental policy of guarding against monopolies of public lands by large corporations or single individuals. It must be admitted that Congress had that policy in view when it declared that the lands not sold or disposed of within three years after the entire road should be completed should be subject to settlement and preemption, at a price not exceeding $1.25 per acre. But this policy was manifestly subordinated to the
752 higher object of having the road constructed and constructed with the aid of the land grant. No limitation was set to the quantity of land which the company might sell to single associations, or single persons. It was left at liberty to sell, if it could, to any land association or private purchaser, the entire body of lands, or any lesser quantity, regardless of the general legislative policy. It was allowed to sell or dispose of the grant at its pleasure, for the purpose of raising money to aid in the road construction, provided thus raising the money was done within the limited period. With that power no preemptor was authorized to interfere. Whatever contingent rights he had were postponed and subordinated to it. If, as we think it manifest, the leading primary policy of the Act was to place the lands in the hands of the company, to be used for the completion of the road, as this work progressed, any secondary policy of the

government may also have had in view ought not to be allowed to embarass or defeat that which was primary. It is evident Congress thought there might be remnants of the grant, not used in aid of the construction of the road, either because other resources of the company might prove sufficient, or because it might be found impossible to dispose of them in time to furnish such aid, and those remnants it undertook to open to settlement and preemption. This appears to us to have been what was intended, and all that was intended. The construction gives full effect alike to the paramount and subordinate purposes of the Act. Each had its own field of operation. The construction contended for by the appellant restricts the power of disposition,
753 denies the authority of the company to utilize, except partially, for the purposes of the grant, the land granted, and might have impaired and possibly defeated the leading purpose of the grant. It subjects the paramount to the subordinate, and postpones the primary object to the secondary. On the other hand, utilizing the lands, by raising money upon them through a mortgage or, in other words, disposing of them by mortgage, did not defeat the policy of opening the remnants not used to preemption."

It is urged in argument that even if the company had no active duty to open these lands to settlement it was bound not to throw obstacles in the way or to resist attempted settlement, and he records of the Interior Department are cited to show it did both. But surely the company did have the right to have the effect of this proviso determined and to raise the question whenever and wherever it might properly come up. It did so before the Department and its view was sustained. There appears never to have been a court decision on the subject. Bad faith or oppres'ive conduct cannot be imputed to the company for thus asserting its claimed rights.

In Oregon & California Railroad Co. v. United States, 238 U. S. 393, the court construed the sale clause in the grant to that company and the case is pressed upon my attention. The proviso there was, "That the lands granted by the Act aforesaid shall be sold to actual settlers only in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre." The court held this
754 to be a continuing and enforceable covenant. It scarsely seems necessary to point out the radical difference between the proviso in that grant and the one here. There sales could be made only to an actual settler, and only one quarter-section to each purchaser. Here there is no limitation set to the quantity which might be sold to a single purchaser. The company was

left at liberty to sell, if it could, its entire grant to one person. Here there is no restriction as to the character of the purchaser. The sales might be made to any person, association or corporation, and settlement was not required. Even those lands, if any, which might be open to settlement at the end of the five year period, the company was not prohibited from selling to anyone it could make sale to. If settlers preempted the land and the Government accepted the preemption, the railroad would receive the payment. That is the entire scope of the proviso.

I conclude that the demurrers to this subdivision must be sustained.

So far as the validity of the mortgages executed following the 1875 foreclosure are concerned, I hold that the United States has recognized them and acquiesced in and waived any possible want of power to their execution in the same manner and to the same extent as it has the foreclosure proceedings. Those mortgages were a part of that plan and inhered in its purpose and in the subsequent construction of the railroad.

755 XIX

1896 FORECLOSURE

Subdivision XVIII relates to the 1896 reorganization of the railroad company and the foreclosure of the mortgages coincident therewith. The allegations are very lengthy and complicated and difficult to abbreviate. The facts pleaded and the inferences alleged from those facts may be epitomized, however, as follows: On August 15, 1893, a creditors' bill was filed in the Eastern District of Wisconsin, and on the same date Henry C. Payne, Thomas F. Oakes, and Henry C. Rouse were appointed Receivers of the Northern Pacific Railroad Company; that in October of the same year a bill of foreclosure under certain of the mortgages put on the property of the company after the 1875 foreclosure, was filed and on October 18th of the same year the same Receivers were appointed after consolidating the creditors' bill and the foreclosure suit.

That under consent decrees entered April 27 and April 28, 1896, in the consolidated cause the mortgages were foreclosed, and that by virtue of sales under these decrees all the properties of the railroad company passed to the Northern Pacific Railway Company which ever since has exercised ownership and claims, as successor to the railroad company to be entitled to receive further and additional lands under its land grants.

That said consent decrees and all sales held under them
756 were pursuant to a plan of reorganization of date March

16, 1896, made with the intent and purpose to obtain for the successor company all property of the railroad company, including its land grants. And for that purpose the Northern Pacific Railway Company was created under the laws of the State of Wisconsin through the purchase and amendment of the Charter of the Superior and St. Croix Railroad Company, a Wisconsin corporation.

That pursuant to the foreclosure decrees a special master, after prescribed notice, sold the lands of the railroad company to the Northern Pacific Railway Company, but that the sales thereof were fraudulent, and that they were not bona fide under the Joint Resolution of May 31, 1870, in that it was not intended by the plan of reorganization that any of the lands should be permitted to go to third persons; that the purchase price was paid by the mortgage bonds of the railroad company and thereby it received values in excess of the prices the lands would have realized had they been sold bona fide to third persons, all of which is said to have been in violation of the provisions of the Joint Resolution of May 31, 1870, and in defeat of the policy of the United States as expressed in that Resolution, and otherwise, with respect to the disposition of its public domain.

The Government neither by the bill nor in argument is attempting to set aside the decrees of foreclosure or the sales had under those decrees. It does not allege, and is not claiming that its use of the railroad as a post route at the reduced rates fixed by Congress, or its use of the telegraph line at the rates established by Congress is being now, or has been at any time
757 enterfered with, or that its rights in this respect have been or could be in any way affected by the foreclosure proceedings. The contentions made are, first, that as the decrees were consent decrees, and as they were charged to have been fraudulent and collusive, and as the sales of land are alleged not to have been in conformity with the Joint Resolution, but in fraud thereof, that the company's hands are not clean in respect of these foreclosure proceedings, and that, therefore, it may not claim equitable relief.

I have already ruled that this maxim has no application to the defendants in this case because they are not seeking affirmative relief but are defending only against the case made by the plaintiff. But I do not see how, taking the allegations, as they must be taken, as true within their natural import, and within matters as to which the Court can take Judicial notice, there is anything fraudulent or inequitable charged. Such a reorganization as that of 1896—indeed that reorganization itself, was recognized as perfectly proper by the Supreme Court in the case of Northern

Pacific Railway Company v. Boyd, 228, U. S. 482. It is difficult to conceive of a plan except some such plan as resorted to here by which the integrity of the road and its insured continued operation could have been preserved. It would be intolerable to announce the doctrine that the bond holders and stock holders of a corporation like the Northern Pacific Company could not protect themselves by reorganization in times of financial stress and inability of the company to continue. I think it would be
758 contrary to public policy to hold such a doctrine. The effect would be to declare that a railroad built at such great expense through years of effort not only by the company itself but by the Government, upon which so many enterprises and so many communities depended for transportation should be wrecked. All that was said in the Boyd case—all that was before the Court was, that while it was perfectly proper to reconstruct the affairs of the company as was done in that case, in as much as the effect of it all was that the stockholders retained their interest in the property subject only to the new mortgages, and as Boyd had a valid claim against the old company he could reach its properties—notwithstanding the reorganization—because it was still in the hands of its original owners. Second, it is claimed that the reorganization did not free the lands in the hands of the railway company from the settlement and pre-emption proviso in the Joint Resolution of May 31, 1870, and that, therefore, as claimed in the subsequent subdivision of the bill the Government was entitled to relief against it on account of its failure to observe that proviso. If this be conceded it does not in any way strengthen the subdivision under consideration. It contributes nothing either to the purpose or the effect of the allegations.

The greatest stress of argument, however, is placed upon the proposition that by what was contemplated by the reorganization agreement, and by what was actually done thereunder, it was manifestly intended the railway company should acquire all the lands of the railroad company in defiance of the requirement of the Joint Resolution of May 31, 1870, that on foreclosure
759 sales of land should be made at public auction in subdivisions in states and territories where situate to the highest and best bona fide bidders, and that it was intended by that proviso that third persons should be the purchasers and not the railway company itself through a new company owned by its old stockholders. That the sales, although actually made in the subdivisions required by the Joint Resolution, and in the states and territories where situate, was but a form as the railway company, by virtue of its ownership of the bonds secured by the foreclosed mortgages, could, under the terms of the decree and

did, in fact, purchase all the lands to the exclusion of the other bidders. I presume this is true. Precisely the same thing results, however, where an individual foreclosing a mortgage in a large sum upon real estate is permitted, as he universally is, under the practice of the courts, to bid in the mortgaged land and pay for it by the indebtedness secured. Certainly he is in a position of great advantage over another bidder who is required to put up cash. It has, however, never been suggested that there was anything wrong or oppressive in such a practice. It should be remembered here that the grant to the railroad company, far from exhausted in 1896, was an essential and integral part of the system. That these lands were necessary to the railway company as security for its contemplated new mortgages. There is no language in the Joint Resolution requiring the sales to be to third persons. There is no reason, either in public policy or in required construction of the language, to give it that interpretation. The provision in terms is that the lands should
760 be sold at public auction at places within the states and territories where situate after not less than sixty days' previous notice, in single sections or subdivisions to the highest and best bidders. There is no inhibition expressed or implied, that I can see, against any organization, intending to acquire the road and its lands and to operate them as a continued whole, becoming a bidder and purchaser. If such an organization upon the sales offered the highest and best bid it was within the terms of the proviso. I can see no authority in this Court to declare otherwise. But if such a purchase was subject to criticism or to objection I do not see what relevancy it can have in this suit. The Government cannot, after all these years, set aside the sales, as already remarked, it does not seek to do so either in its allegations or by its prayer, or by any claim made in argument. It says, only, that in consequence of such action the hands of the railway company in this court are not clean within the equitable maxim, and in consequence, on final adjustment of the grant, there should be lost to the railway company some portion of its grant earned by its predecessor. Such an effect is not possible. I do not think there was anything wrong in the purchase of the lands in the manner alleged. If it were wrong in any way, or in any degree, still, as I have already ruled, the railway company is not in an attitude in this case where the maximum can be invoked against it.

I think, therefore, the demurrer to this subdivision should be sustained.

The defendant pleads that the validity of these proceedings is res judicata. I have already ruled that such a plea
761 cannot go in bar of the action, but that it is evidential and

must be offered at the final hearing. Therefore, the plea must be overruled. But as your Honor may take a different view of it I will state precisely what is claimed under it and my views as to the effect of it.

The Portland Over-lap case, 193 U. S. 1 (N. P. Exhibit 20) is pleaded. It is said that the United States alleged in that case and depended upon the validity of the foreclosure and sales, and that the defense of the Railway Company, and its claim to the land in suit likewise depended upon the validity of those proceedings, and that, therefore, of necessity the validity was, in fact and in law, adjudged by the Court. I think no other effect can be given to it. So, also, as to the Yakima Indian Reservation case, 227 U. S. 355 (N. P. Exhibit 21) and the Forest Reserve case, 256 U. S. 51 (N. P. Exhibit 22).

I think, as counsel said in argument, that the Supreme Court stated only a perfectly well known and well settled and adjudicated fact when it said in the Forest Reserve case: "The rights and obligations of the original railroad arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other." It is impossible to regard these cases in any other light than as a distinct and direct adjudication of the effect of the foreclosure and reorganization proceedings of 1896. If the plea is available to the defendants at this stage of the proceedings I think it should be sustained.

762 Defendants plead, likewise, estoppel. This is rested upon these propositions, (a) the opinion of Attorney General Harmon, February 6, 1897, (b) of Assistant Attorney General Van Devanter, November 1, 1899, and again on December 26th, 1899, and (c) of Attorney General Moody on April 12, 1905, all holding that the Northern Pacific Railway Company, by virtue of foreclosure proceedings and the sales thereunder had succeeded to all the property, rights, and franchises of the Northern Pacific Railroad Company, and had, as such successor, become entitled to patents for the granted lands. Thereafter the Secretary of the Interior approved issuance of patents to the Railway Company for vast acreage of land within both place and indemnity limits under the Act of July 2, 1864, and under the grant of the Joint Resolution of May 31, 1870. The railway company, as successor to the railroad company has been required by the Government to transport its troops, mails, and supplies at reduced rates, saving the United States in such transportation a half million dollars a year in recent years. Complaints against the foreclosure were called to the attention of Congress. Resolutions for investigations were introduced many years ago. No action was taken. Moreover, the views expressed by the several

Attorneys General and recognized by the Department was taken by the Government in the cases pleaded as res judicata by the allegations of the complaint in the several cases.

I think that by all these things through many years the Government has elected to waive any right it might have ever had of objecting to the foreclosure proceedings or to the sales of land thereunder. Indeed, in this very case the Government is seeking between itself and the railway company an adjust-
763 ment of the grant. Of necessary consequences this is a direct recognition and intentional acquiescence in the ownership of these lands by the Northern Pacific Railway Company.

I hold, therefore, that the plea of estoppel should be sustained.

764 XX

FORFEITURE

Subdivision XXXVIII of the bill alleges that by the Act of June 25, 1929, all unsatisfied indemnity selection rights claimed by the railroad company or by any successor in interest, together with all claims to additional lands under the grants, are declared forfeited to the United States. The bill prays an enforcement of the forfeiture thus declared. Grounds for the forfeiture are not declared in the Act nor alleged in the pleading except as inferable from the general scope of the bill.

By section 8 of the Act of July 2, 1864, it is declared "That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, * * *." The conditions stated are that construction shall commence within two years from the approval of the Act, continue at a certain yearly mileage, and that the whole shall be completed by July 4, 1876. These are conditions subsequent strictly and technically. There are no other conditions subsequent in the Act. No right of forfeiture except for breach of these conditions, or some one or more of them, is reserved and none others can exist.

In the discussion of the doctrine of waiver and acquiescence (pp. 41 et seq. supra) I have expressed the opinion that as Congress made the grant upon these conditions subsequent it must have intended to subject the Government to the rules of law governing such conditions, including waiver. Moreover, I there point out, it has been a long settled rule that Congress, like any other proprietor, may waive such a condition, not only
765 expressly but by such acts and acquiescence as would constitute waiver by an individual grantor. Ordinarily conditions subsequent are attached only to a grant of land. There

is no reason why anything that may pass by grant and which vests in the grantee a property right may not likewise be made subject to condition and forfeited, or forfeiture waived, in precisely the same way and with the same effect. By this section not only the grant but every right and privilege in the Act is declared to be upon the named condition. I am of the opinion, therefore, that not only the grant of place lands but the right to make indemnity selections are within the conditions. This being so it follows as of course that the validity of any attempted forfeiture of such indemnity rights is determinable by precisely the same rules as an attempted forfeiture of lands in place. For it is not open to doubt that the right to select and receive other lands for those lost is a property right of equal value to the same acreage in lieu to which they were alowed to be selected. If, however, this view is not perfectly correct then by no possibility is the right to make the indemnity selections forfeitable. If it is forfeitable at all it is because it is a condition, failure to comply with which avoids the right. If it is not this it is no more than a simple term of the contract to which by no possibility the right to forfeit attaches.

It is admitted that the condition for date of commencement (as extended) was performed, but that those as to rate of progress of the work and for the date of completion (as extended) were broken. The only remaining question then is whether in fact the breach has been waived.

766 It is a principle too firmly established to be open to question that a court of equity will not interfere on behalf of a party entitled to forfeiture and in any wise undertake to enforce it. This upon the universal principle that a court of equity refuses to aid any party who, by the remedy he is seeking, is not himself doing equity. There are in fact no exceptions to this doctrine. I do not understand at all what counsel means by an equitable forfeiture. There is no such thing. Of course the cases are without number, and the illustrations many and various, where courts of equity will not interfere to prevent forfeiture. So, likewise, where forfeiture has actually taken place there are instances where equity will enforce some right which may arise out of the executed forfeiture. These cases are very few, however, and none of them come within the facts here. These principles are best put by Mr. Pomeroy (Pom. Equity, 459 et seq.) I think the facts here make a case of conclusive waiver by Congress and by every other branch of the Federal Government of a right to forfeit. I have already discussed or related at pages 10 and 11, supra, the recommendations of Secretaries of the Interior and the action of the President in con-

templation that Congress might by legislation forfeit the grant, and also the course of legislation in Congress looking toward a forfeiture first in 1880 and again in 1882. Thereafter Congress took no steps whatever until 1890 upon the question. Fourteen forfeiture bills had been introduced in Congress. Some, it is said, related to all grants then in default, and some only to the Northern Pacific grant. These bills resulted in the Act
767 of September 29, 1890 (26 Stat. 496), forfeiting the lands opposite unconstructed road of the defendant between Wallula and Portland, and all other land grants opposite unconstructed road. If further confirmation were needed of the purpose of Congress not to forfeit the grant of the Northern Pacific and rights accruing to it under its grant because of failure to observe the condition as to time of completion, this Act would be conclusive. I shall point out only that, beginning with the Act of July 10, 1882 (22 Stat. 157), affecting and ratifying an agreement with the Crow Indians, Congress enacted a long series of Statutes relating to various aspects of the Northern Pacific grant, every one of which are more or less inconsistent with the right to claim forfeiture. These Acts are all recited, beginning at page 3 of the Answer of Northern Pacific Railway Company. The Mineral Classification Act, which is considered in this report at page 123 supra, is, of itself, conclusive of the question. This Act recognized the grant as in existence and as having been earned by the company. Its purpose was to expedite the conveyance of lands thus earned. It related in its very terms to the lands princip'ly intended by the forfeiture declared by the Act of June 25, 1929, in this suit sought to be enforced.

I have no difficulty in holding that the plea of waiver and acquiescence against forfeiture should be sustained.

768

XXI

MISCEL'ANEOUS SUBDIVISIONS

1. SUBDIVISION XIV. It is alleged the purpose of Congress in chartering the Northern Pacific and granting to it lands was that all its properties should be used primarily to build a line of road and telegraph. That under certain contracts with the Oregon and Trans-Continental Company, and various branch-line companies, the Northern Pacific dissipated its funds in the construction of branch lines, and that the contracts were collusive and fraudulent devices whereby the Oregon and Trans-Continental Company received illegal profits at the expense of the Northern Pacific. The argument is the transactions were ultra vires. This may be conceded, but the Government is not now seeking

to restrain the company to the exercise of powers within its charter. The most that can be said is that at one time the Government might conceivably have had grounds to restrain the contracts denounced and to require the company on proper terms to relieve itself thereof. It is not argued that these contracts are now in existence or that anything illegal is now being done under them, or has been for many years. It is difficult to see, therefore, what remedy the Government can now have. It is said in argument that the contracts were fraudulent and intended to milk the Northern Pacific for the benefit of insiders in that company. If these charges were well pleaded it is not inquirable into in this case under plain, well-settled principles, declared by the Supreme Court in United States v. Union Pacific Railroad Company, 98 U. S. 569. The facts alleged can have no
710 bearing whatever in the adjustment of the land grant. It does not go either to the settlement of the grant or to what the company has earned thereunder.

I sustain the demurrer to this subdivision.

2. SUBDIVISION XV. It is alleged that large areas of the granted lands were diverted from the purpose intended by Congress in the grant and that they were not sold under bona fide contracts for the purpose of raising money in aid of the construction of the road.

For manifest reasons the demurrer to this subdivision is sustained.

3. SUBDIVISION XXIX-A. It is alleged that various patents were erroneously issued to the railroad company because the Land Department treated the lands as coming under the grant when, in fact, at the dates of the different locations they were within military or Indian reservations, and, therefore, excluded from the grant. Of course, indemnity selections in lieu of such losses might have been made.

To this subdivision a demurrer has been interposed and a plea of res Judicata based upon United States v. Northern Pacific Railroad Company, et al. (N. P. Exhibit 23). An additional plea of res judicata is interposed as to lands within the Yakima Indian Reservation included in this subdivision based on the case of United States v. Northern Pacific Railway Company, 227 U. S. 355.

Considering the plea of this case first, I think it cannot
770 be questioned that it did thereby definitely adjudicate as between the Government and the Railway Company the southern and western limits of the reservation. If these lands are outside those limits it certainly must be deemed as adjudicated that the patents to the railway company were not in error. I can find nothing in the record which enables me to determine

that these lands are outside the reservation as established in this case, although counsel on both sides seem to admit it. It may be I have overlooked something. However, the result would not be changed.

For the reasons previously and several times stated I overrule both these pleas.

Again, I do not wish to be misunderstood. Some of these lands are admitted to have been erroneously patented. What effect will be given and what rights, if any, the Government may have in respect of such errors can be determined only on the final hearing. It may eventuate on the final adjustment that the doctrine expressed in United States v. Northern Pacific Railroad Company et al., supra, may be applicable both as a principle of law and as an adjudication, and it may likewise turn out that United States v. Northern Pacific Railway Company, 227 U. S. 355, supra, may be applicable as an adjudication. I am only holding now that I cannot determine these questions at this stage.

4. SUBDIVISION XXX. It alleges certain conclusions of the pleader as to the relief the United States is entitled to because of matters alleged in prior subdivisions of the bill.

I do not see any possible place for it in the bill, nor do I see
how either party is to be injured by its remaining
771 in or going out. The conclusions stated are either right
or wrong, and it makes not the slightest difference which.
But as the question is raised I shall sustain the demurrer.

5. SUBDIVISION XXXIII. It is alleged that the railroad company was required by the Act of July 15, 1870 (16 Stat. 305), to reimburse the United States for the cost of surveys within the grant and that prior to the decision in Northern Pacific Railroad Company v. Traill County, 115 U. S. 600, it refused to pay to the United States these costs. That case was decided December 7th, 1885. It is not alleged that the company did not ultimately pay the fees, but merely they were not paid until the Supreme Court had decided the company were required by the Act to make payment. I can see no possible effect the facts thus alleged have upon this case. No relief is sought, and patently none could be had. I sustain the demurrer to this subdivision.

6. SUBDIVISION XXXIV. I will overrule the demurrer to this subdivision. I do this solely because of the misunderstanding that has arisen between counsel as to whether the question is open at this time. I do not think it is a matter of any consequence whether the demurrer is sustained or overruled. On the final hearing neither party will be prejudiced by this ruling.

7. SUBDIVISION XIX. I sustain the demurrer to this subdivision upon the ground that it is wholly immaterial.

772 XXII

PLEA OF INNOCENT PURCHASE BY BANKERS TRUST COMPANY AND CITY BANK AND FARMERS TRUST COMPANY

Of the three trust companies named defendants the Guaranty Company has disclaimed by proper answer any interest in the subject matter of the suit. Each of the others has filed a separate answer.

Defendant, Bankers Trust Company, is trustee under a mortgage executed by the Northern Pacific Railway Company under date of November 10, 1896, known as "the prior lien mortgage", to secure a present outstanding principal amount of bonds in the sum of $107,330,600. These bonds are issued in both coupon and registered form, coupon bonds in denominations of $500 and $1,000, and registered bonds in denominations of $100 and such multiples thereof as may be prescribed by the railway company. The greater portions of these bonds are in coupon form and pass by delivery. No record, therefore, exists by which the identity of the present holders may be accurately determined. Some knowledge, however, is gained from the ownership certificates which individual bond holders and certain others are required to file under Federal income tax regulations. Corporations are not required to file such certificates and there is, therefore, as to the greater part of the holdings of these coupon bonds no record. The evidence shows, however, the distribution of these bonds as of December 1, 1931, as follows:

I. PRIOR LIEN RAILROAD AND LAND GRANT GOLD 4% BONDS

773 Outstanding as of December 1, 1931:

Coupon	$77,807,000.00
Registered	29,523,600.00
Total	$107,330,600.00

Amount of Interest paid on said Prior Lien Bonds during 1931:

To corporations (which, under present income tax regulations, are not required to file ownership certificates)	$2,525,924.57
To individuals and others who did file ownership certificates	1,730,132.43
Total	$4,256,057.00

The ownership certificates filed in connection with the payment of said $1,730,132.43 were as follows:

Foreigners	1,184
Citizens and residents of the United States	2,468
Fiduciary and Trustee accounts	2,015
Partnerships	19
Individuals classed as exempt	749
Total number of ownership certificates	6,435

City Bank Farmers Trust Company is trustee under the "general lien mortgage" dated November 10, 1896, executed by the Northern Pacific Railway Company to secure a bond issue in the principal amount of $190,000,000. Of this sum $130,000,000 principal amount was reserved to retire the prior lien bonds. The remaining $60,000,000 principal amount had been authenticated and delivered to the Trust Company, of which amount $54,451,500.00 principal sum is now outstanding in the hands of the public.

II. GENERAL LIEN RAILWAY AND LAND GRANT GOLD 3% BONDS

Outstanding as of December 1, 1931:	
774 Coupon	$43,188,500.00
Registered	11,263,000.00
Total	$54,451,500.00
Amount of interest paid on said General Lien Bonds during 1931:	
To corporations (which, under present income tax regulations, are not required to file ownership certificates)	$1,008,733.83
To individuals and others who did file ownership certificates	630,247.17
Total	$1,738,981.00
The ownership certificates filed in connection with the payment of said $630,247.17:	
Foreigners	407
Citizens and residents of the United States	1,407
Fiduciary and Trustee accounts	1,347
Partnerships	20
Individuals classed as exempt	645
Total number of ownership certificates	3,826

As in the case of the prior lien mortgage no figures are available as to the number of corporate holders.

In the answer of each trustee company it is pleaded that by virtue of the mortgage to it the holders of the bonds outstanding under the mortgage are innocent holders and by separate answer that the trustee company itself is. As the legal questions raised under this answer are the same I will dispose of them together.

First. I hold that the trustee companies are not innocent purchasers.

Second. I hold that, as to all place lands patented or certified for patent prior to the date of the mortgages, the holders of the outstanding bonds are innocent purchasers.

775 Third. So, likewise, are the bondholders innocent purchasers of all indemnity selections made and approved prior to the date of the mortgage, except such selections in lieu of place lands that did not, and as matter of law could not, pass under the grant. The indemnity selections allowed for claimed

losses within the place limits where the railroad parallels the line of the Portage, Winnebago & Lake Superior Railroad Company are within this exception.

Fourth. I think that the bondholders are likewise innocent purchasers of all place lands actually earned by the railroad company and which passed under the terms of the grant, even though not at the date of execution and sale actually patented or certified. Thus the lands classified under the Mineral Classification Act which were, in fact, not mineral in character, were at that date actually earned and had passed. If by fraud of the railway company the classification was, in whole or in part, wrong, the trust companies are not affected thereby except that the Government may have as against them, as well as against the railway company, a reclassification to determine what lands were, in fact, nonmineral and, therefore, did in fact pass under the grant.

The foregoing views will require that these pleas be sustained in part, and overruled in part. I shall not extend this report by a discussion of the reasons for my holdings on these pleas. If I am correct on the rulings made in respect of the rights of the railway company, of course, the pleas become immaterial except as applied to those lands falling within the rule I followed in discussing the questions in connection with the Portage,
776 Winnebago & Lake Superior grant. If, on the other hand, my views are unsound, then application of the doctrine of innocent purchaser, either as I have held or as the Court may find it should be held, can be taken up.

777

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779 In United States District Court

Amended certificate.

Filed Jan. 14, 1935

In conformity with the order of the Court in the above entitled cause filed October 29, 1934, directing me to report to the Court all of the evidence taken by me, together with all the exhibits offered and received pursuant to the order of this Court dated February 25, 1932, and in accordance with the request of the defendants, and make my certificate that I have done so, and attach said request to said certificate, and in conformity with the order of the Court, filed herein on January 14th, 1935,

I hereby certify that the transcript of testimony, consisting of 469 pages, prepared by Mrs. J. J. Cole, and deposited with the Clerk of said Court, together with the exhibits accompanying said transcript and referred to therein, which exhibits are identified by me and designated as Government's Exhibits 1 to 64, inclusive, Northern Pacific Railway Company's Exhibits 1 to 130, inclusive, City Bank Farmers Trust Company Exhibits 1 and 2, and Bankers Trust Company's Exhibits 1 to 4, inclusive, together with all subdivisions of said exhibits, and together with Government's Exhibits 65 and 66 and Northern Pacific Railway Company's Exhibits 19a, 19b, 20a, 20b, 21a, 21b, 22a, 22b and 25a and 25b, constitute all of the evidence received by me prior to the filing of my report to this Court on May 31, 1933.

I further certify that in considering the evidence in said cause and making my report I took judicial knowledge of the report of the hearing before the Joint Congressional Committee of Congress investigating the Northern Pacific Land Grant.

The request of defendants, dated December 26, 1933, that I report to the Court all of the evidence taken by me is attached to my original certificate dated October 29, 1934.

Dated this 14th day of January, 1935.

F. H. GRAVES,
Master.

[File endorsement omitted.]

780 In United States District Court

Order extending time

Filed June 12, 1933

The above entitled cause coming on for hearing on the application of the United States Attorney for an order extending the time within which to file exceptions to the Master's report filed herein on May 31, 1933, and the Court being of opinion that the time provided by equity rule is not sufficiently long under the circumstances of this case and that additional time should be granted, and the Court being fully advised in the premises,

It is ordered that the time for filing such exceptions be, and the same hereby is, extended to and including July 10, 1933.

Dated this 12 day of June 1933.

J. STANLEY WEBSTER,
United States District Judge.

[File endorsement omitted.]

781 In United States District Court

Exceptions of defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation.

Filed June 20, 1933.

Now come the defendants Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation, and take the following exceptions to the report of the Special Master, Honorable Frank H. Graves, filed with the clerk of this Court on May 31, 1933:

I

The above-named defendants except to the recommendation on page 36 of said report that these defendants' general motion to dismiss be denied. The master's holding is based upon his conclusion that if the motion were sustained, there could be no accounting of the grant (Report pp. 35, 36) and on the further conclusion (Report pp. 34, 35) that the Government may have the grant finally adjusted by this Court. The position of these defendants is that final adjustment of the grant is an administrative function and that the only questions with respect to adjustment of the grant that this Court may determine are those legal quesions that are properly raised by the bill of complaint. Defendants' further position is however that the Court may and must do all the accounting of the grant that is necessary to determine how many acres and what acres have been expropriated by the Act of June 25, 1929, and the amount of compensation due defendants.

II

782 These defendants except to the Master's conclusion that the grant and contract made by the Act of July 2, 1864, were made by the Government in its sovereign capacity and that the Government in this suit is suing in its sovereign capacity to enforce sovereign rights, and that the plea of laches must therefore be overruled (Report pp. 36, 37).

III

These defendants except to the conclusion of the Master that the pleas of res adjudicata made by these defendants should be overruled (Report, p. 38).

IV

These defendants except to the conclusion of the Master that defendants' demurrer to subdivision XXII of the bill of complaint should be overruled (Report, p. 95).

V

These defendants except to the failure of the Master to sustain defendants' plea of equitable estoppel to subdivision XXVIII of the bill of complaint (Report, p. 138).

GRAFTON MASON,
D. R. FROST,
D. F. LYONS,
E. J. CANNON,
Solicitors for Defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation.

[File endorsement omitted.]

783 In United States District Court

Exceptions of Defendant Bankers Trust Company
Filed June 20, 1933

Comes now the defendant, Bankers Trust Company, and takes the following exceptions to the report of the Special Master, Honorable, Frank H. Graves, filed with the Clerk of this Court on May 31, 1933:

I

The above-named defendant excepts to the recommendation on page 36 of said report that this defendant's general motion to dismiss be denied. The Master's holding is based upon his conclusion that if the motion were sustained, there could be no accounting of the grant (Report pp. 35, 36), and on the further conclusion (Report pp. 34, 35) that the Government may have the grant finally adjusted by this Court. The position of this defendant is that final adjustment of the grant is an administrative function and that the only questions with respect to adjustment of the grant that this Court may determine are those legal questions that are properly raised by the bill of complaint. Defendant's further position is, however, that the Court may and must do all the accounting of the grant that is necessary to

determine how many acres and what acres have been expropriated by the Act of June 25, 1929, and the amount of compensation due defendants.

II

This defendant excepts to the Master's conclusion that the grant and contract made by the Act of July 2, 1864, were made by the Government in its sovereign capacity and that the Government in this suit is suing in its sovereign capacity to en-
784 force sovereign rights, and that the plea of laches must therefore be overruled (Report pp. 36, 37).

III

This defendant excepts to the conclusion of the Master that the pleas of res adjudicata made by this defendant should be overruled (Report, p. 38).

IV

This defendant excepts to the conclusion of the Master that defendant's demurrer to subdivision XXII of the bill of complaint should be overruled (Report, p. 95).

V

This defendant excepts to the failure of the Master to sustain defendant's plea of equitable estoppel to subdivision XXVIII of the bill of complaint (Report, p. 138).

VI

This defendant excepts to the first conclusion of law in said Report, contained on page 214 of the Report, under Title 22, Plea of Innocent Purchase, wherein the Master says: "First, I hold that the trustee companies are not innocent purchasers".

VII

This defendant excepts to the third conclusion of law, contained on page 215 of said report, insofar as the Master by implication holds that bondholders are not innocent purchasers of all indemnity selections made and approved prior to the date of mortgage, and especially to the exclusion of certain indemnity selections (Report, p. 97) wherein the Master states "that no lands were granted to the Northern Pacific Railroad Company by the Act of July 2d, 1864, appertaining to that portion of its line between Ashland and Superior and that therefore nothing

was lost to its grant and it cannot select indemnity lands on the basis of the lands comprehended within the territory where the place limits would have been had the grant been made,
785 and that, therefore, the patenting of those lands to the railroad by the Interior Department was erroneous", it being the contention of this defendant that it is an innocent purchaser under its mortgage of said lands.

VIII

This defendant excepts to that portion of the conclusion of law found under paragraph "Fourth", page 215 of the Report, as follows: "Except that the Government may have as against them (meaning the trust companies, of which this defendant is one) as well as against the railway company a reclassification to determine what lands were in fact non-mineral and therefore did in fact pass under the grant," for the reason that the Government's present claim is stale and the attempt to urge said claim is barred because of gross laches; and this defendant excepts to that portion of said report on said page which overrules this defendant's plea in part.

IX

This defendant excepts to the Master's report because said report fails to find:

(1) That plaintiff is not entitled to any relief against this defendant:

(2) That plaintiff is barred from any relief against this defendant on account of plaintiff's gross laches and the staleness of the claim;

(3) That plaintiff is barred from any relief against this defendant because the causes set forth in said complaint are stale and so long a time has passed since the matters and things complained of that to take cognizance thereof would be contrary to equity and good conscience;

(4) That the complaint fails to state any cause of action against this defendant except the cause of action, if any, stated in the paragraphs of said bill of complaint numbered I, II, III, V, XVII, XX, XXI and XXVII, that portion of paragraph numbered IX beginning on page 14 at line 31 and continu-
786 ing through line 13 on page 15, and that portion of the paragraph thereof numbered X beginning on page 23 at line 17, and (omitting the words "herein referred to" in lines 20 and 21, and the words "as more fully hereinafter set forth" in lines 23 and 24 on page 23) continuing through line 2 on page 24, being the cause of action (if any) for which relief is prayed

in that portion of the prayer of said bill of complaint beginning on page 97 at line 10 and continuing through line 5 on page 98;

(5) That plaintiff has had notice of some matters complained of for upwards of thirty years, and others for fifty years or more; that the persons having actual knowledge of the facts in said complaint paragraphs 6 to 17 are now dead and that this defendant has been damaged by laches of plaintiff in that its evidence to disprove plaintiff's claims cannot now be produced, though existent for many years following the occurrences and matters complained of;

(6) That in execuring said prior lien mortgage and in authenticating said prior lien bonds this defendant acted in reliance upon the recitals of the mortgage, marked Exhibit "A" and a part of its answer, which recitals are particularly referred to in paragraphs 25 and 26 of its answer herein, and holds such properties as innocent purchasers for value;

(7) That the railway company by prior lien mortgage conveyed to this defendant the property described in the mortgage granting clause; the said prior lien mortgage was subsequently duly recorded in all offices required by law, and defendant holds all said property as an innocent purchaser for value within the meaning of the Act of June 25, 1929;

(8) That holders of prior lien bonds became such in reliance upon recitals contained in said prior lien mortgage;

(9) That the equity of the prior lien bondholders is superior to the equity of plaintiff with respect to all matters alleged in the complaint;

(10) That the complaint should be dismissed, except
787 that the grants made by the United States to the Northern Pacific Railroad Company were and are defective and that the Court should determine the compensation to which the Northern Pacific Railway Company is entitled for lands taken by the Act of June 25, 1929, and enter a decree therefor, with interest.

WHITE & CASE,
E. J. CANNON,
Solicitors for Defendant,
Bankers Trust Company.

E. J. CANNON,
J. DUPRATT WHITE,
G. T. VAUGHT, JR.
ALFRED N. HEUSTON,
Of Counsel

[File endorsement omitted.]

788 *In United States District Court*

Exceptions of defendant, City Bank Farmers Trust Co.

Filed June 20, 1933

Comes now the defendant, City Bank Farmers Trust Company, and takes the following exceptions to the report of the Special Master, Honorable Frank H. Graves, filed with the Clerk of this Court on May 31, 1933:

I

The above-named defendant excepts to the recommendation on page 36 of said report that this defendant's general motion to dismiss be denied. The Master's holding is based upon his conclusion that if the motion were sustained, there could be no accounting of the grant (Report, pp. 35, 36) and on the further conclusion (Report, pp. 34, 35) that the Government may have the grant finally adjusted by this Court. The position of this defendant is that final adjustment of the grant is an administrative function and that the only questions with respect to adjustment of the grant that this Court may determine are those legal questions that are properly raised by the bill of complaint. Defendant's further position is, however, that the Court may and must do all the accounting of the grant that is necessary to determine how many acres and what acres have been expropriated by the Act of June 25, 1929, and the amount of compensation due defendants.

II

This defendant excepts to the Master's conclusion that the grant and contract made by the Act of July 2, 1864, were made by the Government in its sovereign capacity and that the Government in this suit is suing in its sovereign capacity to enforce sovereign rights, and that the plea of laches must therefore be overruled (Report, pp. 36, 37).

789 III

This defendant excepts to the conclusion of the Master that the pleas of res adjudicata made by this defendant should be overruled (Report, p. 38).

IV

This defendant excepts to the conclusion of the Master that defendant's demurrer to subdivision XXII of the bill of complaint should be overruled (Report, p. 95).

V

This defendant excepts to the failure of the Master to sustain defendant's plea of equitable estoppel to subdivision XXVIII of the bill of complaint (Report, p. 138).

VI

This defendant excepts to the first conclusion of law in said Report, contained on page 214 of the Report, under Title 22, Plea of Innocent Purchase, wherein the Master says: "First, I hold that the trustee companies are not innocent purchasers."

VII

This defendant excepts to the third conclusion of law, contained on page 215 of said report, insofar as the Master by implication holds that bondholders are not innocent purchasers of all indemnity selections made and approved prior to the date of mortgage, and especially to the exclusion of certain indemnity selections (report, p. 97) wherein the Master states "that no lands were granted to the Northern Pacific Railroad Company by the Act of July 2d, 1864, appertaining to that portion of its line between Ashland and Superior, and that therefore nothing was lost to its grant and it cannot select indemnity lands on the basis of the lands comprehended within the territory where the place limits would have been had the grant been made, and that, therefore, the patenting of those lands to the railroad by the Interior Department was erroneous," it being the contention of this defendant that it is an innocent purchaser under its mortgage of said lands.

790

VIII

This defendant excepts to that portion of the conclusion of law found under paragraph "Fourth", page 215 of the Report, as follows: "Except that the Government may have as against them (meaning the trust companies, of which this defendant is one) as well as against the railway company a reclassification to determine what lands were in fact nonmineral and therefore did in fact pass under the grant", for the reason that the Government's present claim is stale and the attempt to urge said claim is barred because of gross laches; and this defendant excepts to that portion of said report on said page which overrules this defendant's plea in part.

IX

This defendant excepts to the Master's report because said report fails to find:

(1) That plaintiff is not entitled to any relief against this defendant;

(2) That plaintiff is barred from any relief against this defendant on account of plaintiff's gross laches and the staleness of the claim;

(3) That plaintiff is barred from any relief against this defendant because the causes set forth in said complaint are stale and so long a time has passed since the matters and things complained of that to take cognizance thereof would be contrary to equity and good conscience;

(4) That the complaint fails to state any cause of action against this defendant except the cause of action, if any, stated in paragraphs of the complaint listed and specified in paragraph 46 of this defendant's separate answer;

(5) That plaintiff has had notice of some matters complained of for upwards of thirty years, and others for fifty years or more; that the persons having actual knowledge of the facts in said complaint, paragraphs 6 to 17, are now dead and that this defendant has been damaged by laches of plaintiff in that its
791 evidence to disprove plaintiff's claims cannot now be produced, though existent for many years following the occurrences and matters complained of;

(6) That in executing said general lien mortgage and in authenticating general lien bonds, this defendant acted in reliance upon recitals of the mortgage listed and quoted in paragraph 49 of this defendant's separate answer;

(7) That the railway company by general lien mortgage conveyed to this defendant the property described in the mortgage granting clause; the said general lien mortgage was subsequently duly recorded in all offices required by law, and defendant holds all said property as an innocent purchaser for value within the meaning of the Act of June 25, 1929;

(8) That holders of general lien bonds became such in reliance upon recitals contained in said general lien mortgage;

(9) That the equity of the general lien bondholders is superior to the equity of plaintiff with respect to all matters alleged in the complaint;

(10) That the paragraphs of the complaint referred to, cited and listed in the first prayer of this defendant's separate answer, should be stricken from the complaint.

TAYLOR, BLANC, CAPRON & MARSH,
E. J. CANNON,
Solicitors for defendant,
City Bank Farmers Trust Company.

MANSFIELD TERRY,
EDWARD E. WATTS JR.,
HENRY R. LABOUISAL,
E. J. CANNON,
Of Counsel.

[File endorsement omitted.]

792 In United States District Court

Exceptions of plaintiff

Filed July 8, 1933

Now comes the United States of America, the plaintiff in the above-entitled cause, and excepts to the report of Honorable Frank H. Graves, Special Master herein, filed in the office of the Clerk of this Court on the thirty-first day of May 1933 in the following particulars, to-wit:

I

The plaintiff excepts to the conclusion of the Master (page 31 of his report) that the clean-hands doctrine does not apply to the defendants in this case.

II

The plaintiff excepts to the conclusion of the Master (page 61 of his report) relative to Subdivisions VII and VIII of the bill of complaint, wherein he states "that the respective demurrers to these subdivisions should be sustained."

III

The plaintiff excepts to the conclusion of the Master (page 87 of his report) with reference to Subdivisions IX, X, XI, and XII of the bill of complaint, wherein he states that "the demurrer should be sustained to each and every one of them" (Deleted, see stipulation filed 1/11/34) and to the conclusion of the Master (page 211 of his report) with reference to Subdivision XI, where he states, "I sustain the demurrer to this sub-division upon the ground that it is wholly immaterial."

IV

The plaintiff excepts to the conclusion of the Master (page 87 of his report) relative to Subdivisions IX, X, XI, and XII of the bill of complaint wherein he states that "the plea of acquiescence and waiver should be sustained."

V

The plaintiff excepts to the conclusion of the Master (page 87 of his report) wherein he states that "the motion of the defendants railway company and improvement Company to quash return of service on the railroad company as reorganized
793 in 1875 should be sustained because I think there is no such concern in existence and never was and, hence, there was nobody who could be sued and of course nobody could be served."

VI

The plaintiff excepts to the remark of the Master (page 87 of his report) with reference to the effect of the 1875 foreclosure proceedings upon the land grant under the terms of the Joint Resolution of May 31, 1870, wherein he states "I shall hold that the Government has no cause of complaint in that behalf."

VII

The plaintiff excepts to the conclusion of the Master (page 108 of his report) that defendants' plea of "estoppel by reason of the Yakima Indian transaction, and by reason of the years of recognition of the line by the Government," directed to Subdivision XXVI of the bill of complaint, should be sustained.

VIII

The plaintiff excepts to the conclusion of the Master (page 111 of his report) that defendants' demurrer directed to Subdivision XXVI of the bill of complaint should be sustained.

IX

The plaintiff excepts to the conclusion of the Master (page 122 of his report) that the demurrer to Subdivision XXXV (inadvertently referred to by the Master as Subdivision XXV) of the bill of complaint should be sustained.

X

The plaintiff excepts to the conclusion of the Master (page 146 of his report) with reference to Subdivision XXVIII of the bill of complaint, that defendants' demurrer to said Subdivision ought to be sustained.

XI

The plaintiff excepts to the conclusion of the Master (page 161 of his report) relating to the subject-matter of Subdivision XXIX of the bill of complaint, to the effect that no reservation coming within section 3 of the Act of July 2, 1864, was created by the Fort Laramie Treaty of September 17, 1851, and that the territories of the tribes referred to in said treaty remained Indian country within section 2 of the Act of July 2, 1864, whereas the Master should have concluded that the lands embraced within said treaty were not "public lands" but were lands which the Indians were left free to occupy under treaty stipulations with the United States and were excepted from said Act of July 2, 1864, under the provisions of section 3 thereof.

794

XII

The plaintiff excepts to the conclusion of the Master (page 164 of his report) relating to the subject-matter of Subdivision XXIX of the bill of complaint, to the effect that no reservation for the Blackfoot tribes so as to bring their territory under section 3 of the Act of July 2, 1864, was created by the Blackfoot Treaty of October 17, 1855, and that the territory of said tribes continued to be Indian country until subsequently its status was altered, whereas the Master should have concluded that the lands embraced within said treaty (other than the common-hunting ground described therein) were not "public lands" but were lands which the Indians were left free to occupy under treaty stipulations with the United States, and were excepted from the said Act of July 2, 1864, under the provisions of section 3 thereof.

XIII

The plaintiff excepts to the conclusion of the Master (page 171 of his report) that defendants' demurrer to Subdivision XXIX of the bill of complaint should be sustained.

XIV

The plaintiff excepts to the conclusion of the Master (page 171 of his report) that defendants' plea of estoppel directed to Subdivision XXIX of the bill of complaint should be sustained.

XV

The plaintiff excepts to the conclusion of the Master (page 180 of his report) that defendants' motion to dismiss Subdivision XXXII of the bill of complaint should be sustained.

XVI

The plaintiff excepts to the conclusion of the Master (page 194 of his report) relating to Subdivision XIII of the bill of complaint, wherein he states that "the demurrers to this subdivision must be sustained."

XVII

The plaintiff excepts to the conclusion of the Master (page 194 of his report) as to the validity of mortgages executed following the 1875 foreclosure proceeding "that the United States has recognized them and acquiesced in and waived any possible want of power to their execution in the same manner and to the same extent as it has the foreclosure proceedings," whereas the Master should have concluded that the United States has not recognized said mortgages nor acquiesced in and waived want of
795 power for their execution.

XVIII

The plaintiff excepts to the conclusion of the Master (page 200 of his report) relating to Subdivision XVIII of the bill of complaint wherein he states that "the demurrer to this subdivision should be sustained."

XIX

The plaintiff excepts to the conclusion of the Master (page 203 of his report) that defendants' plea of estoppel directed to Subdivision XVIII of the bill of complaint should be sustained.

XX

The plaintiff excepts to the conclusion of the Master (page 207 of his report) relative to the subject matter of Subdivision XXXVIII of the bill of complaint, "that the plea of waiver and acquiescence against forfeiture should be sustained."

XXI

The plaintiff excepts to the conclusion of the Master (page 209 of his report) relating to Subdivision XIV of the bill of complaint wherein he states "I must sustain the demurrer to this subdivision."

XXII

The plaintiff excepts to the conclusion of the Master (page 211 of his report) that defendants' demurrer to Subdivision XXXIII of the bill of complaint should be sustained.

XXII-A

(See Stipulation filed 1/11/34)

PLEA OF INNOCENT PURCHASER BY BANKERS TRUST COMPANY AND CITY BANK FARMERS TRUST COMPANY

XXIII

The plaintiff excepts to the conclusion of the Master (page 214 of his report) that as to all place lands patented or certified for patent prior to the date of the mortgages, the holders of outstanding bonds under said mortgages are innocent purchasers.

XXIV

The plaintiff excepts to that portion of the Master's conclusion (set forth in the first paragraph on page 215 of his report) which reads as follows: "Third: So, likewise, are the bondholders innocent purchasers of all indemnity selections made and ap-
796 proved prior to the date of the mortgage, except such selections in lieu of place lands that did not, and as matter of law could not, pass under the grant;" but plaintiff does not except to that portion of the Master's statement by which he impliedly concludes that the bondholders are not innocent purchasers of lands obtained as selections in lieu of place lands that did not, and as matter of law could not, pass under the grant, nor does plaintiff except to the last sentence in the paragraph reading as follows: "The indemnity selections allowed for claimed losses within the place limits where the railroad parallels the line of the Portage, Winnebago & Lake Superior Railroad Company are within this exception." The Master should have concluded that the bondholders are not innocent purchasers of any indemnity lands or any claims for indemnity lands which have been or might be obtained under the Act of July 2, 1864, or the Resolution of May 31, 1870.

XXV

The plaintiff excepts to the conclusion of the Master (page 215 of his report) that the bondholders are innocent purchasers of

all place lands actually earned by the Railroad Company and which passed under the terms of the grant even though not at the date of execution and sale actually patented or certified, and plaintiff further excepts to the conclusion of the Master wherein he states "If by fraud of the railway company the classification was, in whole or in part, wrong, the trust companies are not affected thereby." The Master should have concluded that the bondholders are not innocent purchasers of any place lands granted under the provisions of the Act of July 2, 1864, or the Resolution of May 31, 1870.

GEORGE C. SWEENEY,
Assistant Attorney General.
ROY C. FOX,
United States Attorney for the Eastern District of Washington.
D. F. McGOWAN,
Special Assistant to the Attorney General.
E. E. DANLY,
Special Assistant to the Attorney General.

[File endorsement omitted.]

797 In United States District Court

Stipulation

Filed Jan. 11, 1934

It is hereby stipulated by and between the undersigned parties to the above-entitled cause, by their respective solicitors, to correct an inadvertence of the Master, that the numeral "XI" on page 211 of his report be changed to read "XIX" and that that part of plaintiff's Exception III to the report of the Special Master filed herein, which excepts "and to the conclusion of the Master (page 211 of his report) with reference to Subdivision XI, where he states 'I sustain the demurrer to this subdivision upon the ground that it is wholly immaterial'" shall be deleted from plaintiff's Exception III and shall be considered by the Court to be plaintiff's exception to the conclusion of the Master with reference to Subdivision XIX, which Subdivision XIX now is erroneously referred to on page 211 of the Master's report as "Subdivision XI." This exception shall be known as plaintiff's Exception XXII-A and shall read as follows:

The plaintiff excepts to the conclusion of the Master (page 211 of his report) with reference to Subdivision XIX where he states

"I sustain the demurrer to this subdivision on the ground that it is wholly immaterial."

Dated January 10th, 1934.

UNITED STATES OF AMERICA, *Plaintiff*,
By HARRY W. BLAIR,
Assistant Attorney General.
ROY C. FOX, by E. J. FARLEY,
United States Attorney for the Eastern District of Washington, Northern Division.
D. F. McGOWAN,
Special Assistant to the Attorney General.
E. E. DANLY,
Special Assistant to the Attorney General.
HARRY B. FLEHARTY,
Special Assistant to the Attorney General.

798 In United States District Court

Order approving stipulation

Filed Jan. 11, 1934.

The stipulation to change the number "XI" on page 211 of the Master's report to read "XIX" and to allow the plaintiff an exception to the Master's report, the same to be numbered XXII-A, is hereby allowed and approved.

Dated at Spokane, Washington, this 11th day of January 1934.

J. STANLEY WEBSTER,
United States District Judge.

[File endorsement omitted.]

799 In United States District Court for the Eastern District of Washington, Northern Division

No. E-4389

UNITED STATES OF AMERICA, PLAINTIFF

v.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, ET AL., DEFENDANTS

Homer Cummings, Attorney General, Harry W. Blair, Assistant Attorney General, E. E. Danly, Special Assistant to the Attorney General, J. Crawford Biggs, Special Assistant to the

Attorney General, J. M. Simpson, United States Attorney, Counsel for United States of America.

D. F. Lyons, D. R. Frost, Grafton Mason, F. J. McKevitt, Counsel for Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company.

Taylor, Blanc, Capron and Marsh, F. J. McKevitt, Mansfield Terry, Edward C. Watts, Jr., Henry R. Labouisse, Counsel for City Bank Farmers Trust Company.

White and Case, F. J. McKevitt, J. Du Pratt White, G. L. Vaught, Jr., Alfred N. Hueston, Counsel for Bankers Trust Company.

Memorandum opinion

Filed Sept. 9, 1935

Plaintiff's bill in equity in this case was filed pursuant to the provisions of the Act of June 25, 1929 (46 Stat. 41). Upon the filing of the defendants' answers the defendants moved that there be taken up in advance of trial under Equity Rule XXIX certain defenses pleaded in the answers. This rule provides that "Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the Court". The motion was granted and on February 25, 1932 Frank H. Graves, Esquire, was appointed special
800 master in chancery and these defenses were referred to him for consideration and report. After taking testimony pertinent to the defenses referred to him the special master fixed May 10, 1932, as the time for oral argument. Counsel for both sides of the controversy appeared at the time appointed and the arguments covered the period from May 10, 1932, to May 25, 1932. The report of the special master was filed on May 31, 1933. Thereafter exceptions to the report were duly filed by the parties respectively, the plaintiff filing twenty-five exceptions and the defendants filing fourteen. These exceptions challenge practically all of the conclusions and recommendations of the special master. Thereafter the Court fixed January 9, 1934, as the time for hearing argument on the exceptions and these arguments covered, without interruption, the period from January 9, 1934, to and including January 24, 1934. At the conclusion of the oral arguments time was allowed for the filing of briefs and in due course voluminous, exhaustive and extraordinarily able briefs were filed. The case is now under submission on the exceptions to the report of the special master.

Equity Rule 61½, promulgated May 31, 1932, provides in part that "the report of the master shall be treated as presumptively correct, but shall be subject to review by the Court and the Court may adopt the same, or may modify or reject the same in whole or in part when the Court in the exercise of its judgment is fully satisfied that error has been committed."

After careful and painstaking consideration and study of the oral arguments and elaborate briefs and an examination of the controlling authorities, and after repeated and critical perusals of the special master's report, I am not only not "fully satisfied" that error has been committed by the special master but on the contrary I am "fully satisfied" that his conclusions are sound and correct. His report is painstaking, exhaustive and masterful, and the more I have examined and analyzed it in the light of the vigorous criticisms of it, made in oral arguments and written brief, the more I am convinced that his views and conclusions are sound and are amply sustained in reason, principle and authority.

Whilst in some instances additional reasons might be advanced in support of the conclusions reached, and in others different reasons may suggest themselves, in every instance I find myself in complete accord with the result arrived at. If the learned special master and I were sharing a joint and equal responsibility as members of a court in deciding the questions involved, and he had submitted his report in the form of a proposed opinion, I should not hesitate fully to concur in it. In such circumstances it would serve no useful purpose but would be a labor of supererogation on my part to undertake any extensive elaboration of the master's report.

801

On the important question of the proper application of the equitable maxim or doctrine of "He who comes into equity must come with clean hands" I wish to call attention to the case of Manufacturers Finance Company v. McKey, Trustee in Bankruptcy, 294 U. S. 442, decided by the Supreme Court on March 4, 1935, and long after the special master had filed his report. It seems to me that this case lends strong support to the views of the special master as to the application of the "clean hands" doctrine to the facts of the case in hand.

With respect to Subdivision XXXVIII of the bill, alleging the fraudulent classification of lands under the Mineral Classification Act of February 26, 1895 (28 Stat. 683), I feel a word should be added. In view of the tentative and qualified conclusions of the special master on this aspect of the case (see special master's report, page 146) I attempted during the course of the oral arguments before the Court to have counsel for the government define a trifle more specifically the purpose of these

allegations and just what place they were intended to occupy or what office they were intended to perform in the theory of the government's case. The result was that counsel for the government (Mr. McGowan) by repeated and definite oral statements asserted that no money judgment was sought by the government in the way of damages for the alleged fraudulent classification, nor did the government ask any reclassification of the lands; that the sole purpose of the allegations in this regard was to give rise to the application of the "clean hands" doctrine. No motion for leave to amend the bill in accordance with the special master's suggestion has been made. The sole point, therefore, in this aspect of the case is whether these allegations
802 are sufficient to call for the application of the "clean hands" maxim. Since I fully concur in the special master's opinion that the allegations do not give rise to the "clean hands" doctrine the demurrer or motion directed to the portion of the bill now under consideration should be sustained and this matter should be stricken from the bill.

I feel that a few brief observations are in order concerning Subdivision XXIX of the bill relating to the Fort Laramie Treaty of September 17, 1851, and the Blackfoot Treaty of October 17, 1855—this because of the recent decisions of the Court of Claims in the Fort Berthold case, decided December 1, 1930, and the Blackfoot case, decided April 10, 1933, and the kindred cases decided by that court dealing with the same or similar questions. None of these cases either held or intimated that the lands covered by the treaties in question were reserved lands within the meaning of Section 3 of the Act of July 2, 1864. Under the broad jurisdictional acts, pursuant to which these cases were instituted, it was not necessary to recovery by the Indians that the land be held to constitute a technical reservation under the treaties and we must not be misled by the broad language employed in the opinions of the court. These treaties may well give rise to substantial recovery by the Indians without at all implying that the lands assigned to the various tribes under the provisions of the treaties were removed from the operation of the original land grant to the railway company.

To illustrate how ridiculous it would be to hold that these treaties exempted the lands covered by them from the grant to the railway company let us note briefly the situation as to the Crow Territory alone. Under the Fort Laramie Treaty the acreage in the Crow Territory was 37,500,000 acres and there were approximately 3,000 Crow Indians in 1851. This means that 12,500 acres, or more than eighteen square miles, were "reserved" for each man, woman, and child in the Crow tribe. If

ere had been a reservation of these lands so that they did not ass under the grant of 1864, the railway company would have en compelled to build more than 700 miles of railroad without e aid of the grant except to the limited and comparatively consequential extent that it might be able to secure indemnity. ince the purpose of the Act of 1864 was to aid and encourage e construction of a transcontinental railroad from Lake Superior to Puget Sound it would hardly do to hold that 3 Congress in that very act so contrived as to make the construction of such a railroad impossible. It requires argument to demonstrate that if these lands had been reserved e road could not have been constructed. I am convinced that was never the thought or purpose of the Congress that the nds involved in these treaties were to be excepted from the rant to the railway company, no matter what effect that may ave had in conferring some rights upon the tribes involved.

My conclusion is that all exceptions filed, both by plaintiff nd defendants, be overruled and that the report of the special aster in its entirety be adopted. Order accordingly will be ntered in due course.

4 In United States District Court

Order adopting master's report etc.

Filed Oct. 3, 1935

This cause came on to be heard upon the report of the Special laster, filed herein on the 31st day of May 1933, and the exceptons of the various parties thereto; and the Court having heard rgument and being fully advised in the premises, it is now ordered, adjudged and decreed as follows, viz:

1. All the exceptions of plaintiff and of defendants be and they ereby are overruled.

2. The report of said Special Master be and hereby is adopted its entirety.

3. The replies of plaintiff to the answers and amended answers defendants, Northern Pacific Railway Company and Northestern Improvement Company, and the reply to the answer of e Northern Pacific Railroad Company, be and they hereby are ricken from the files of the Court.

4. The return of service of summons upon Edward A. Clay, as officer of Northern Pacific Railroad Company as reorganized 1875, be and the same hereby is quashed.

5. The following subdivisions and portions of subdivisions of the complaint be and they hereby are dismissed from said complaint: Subdivisions VI, VII, VIII, all of IX except the first two paragraphs thereof, all of X except the third paragraph thereof, XI, XII, XIII, XIV, XV, XVIII, XIX, XXVI, XXVII (granted on application of plaintiff), XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXV, XXXVI, and XXXVIII.

It is further ordered and decreed that the Special Master proceed with the final hearing as provided in the order of appointment entered herein February 25, 1932.

Dated 3rd Oct. 1935.

J. STANLEY WEBSTER,
District Judge.

O. K. as to form,
J. M. SIMPSON,
U. S. Atty.
D. F. LYONS,
Sol. for Defendants, Nor. Pac. Ry. Co., Nor. Pac. Rd. Co. and Northwestern Improvement Company.

[File endorsement omitted.]

805 In United States District Court

Plaintiff exceptions to order of October 3, 1935

Filed Oct. 3, 1935

The United States of America, plaintiff in the above-entitled cause, respectfully excepts to the decree of the Honorable J. Stanley Webster, presiding Judge, which decree was dated and filed in said cause on the 3rd day of October 1935 in each of the following particulars:

(1) Plaintiff excepts to that part of said decree overruling plaintiff's exceptions to the report of Honorable Frank H. Graves, Special Master in Chancery,

(2) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. I to the report of the Special Master.

(3) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. II to the report of the Special Master.

(4) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. III to the report of the Special Master.

(5) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. IV to the report of the Special Master.

(6) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. V to the report of the Special Master.

(7) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. VI to the report of the Special Master.

(8) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. VII to the report of the Special Master.

(9) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. VIII to the report of the Special Master.

(10) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. IX to the report of the Special Master.

(11) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. X to the report of the Special Master.

(12) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XI to the report of the Special Master.

(13) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XII to the report of the Special Master.

(14) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XIII to the report of the Special Master.

806 (15) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XIV to the report of the Special Master.

(16) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XV to the report of the Special Master.

(17) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XVI to the report of the Special Master.

(18) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XVII to the report of the Special Master.

(19) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XVIII to the report of the Special Master.

(20) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XIX to the report of the Special Master.

(21) Plaintiff excepts to that part of the decree overruling plaintiff's Exception No. XX to the report of the Special Master.

(22) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XXI to the report of the Special Master.

(23) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XXII to the report of the Special Master.

(24) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XXII-A to the report of the Special Master.

(25) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XXIII to the report of the Special Master.

(26) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XXIV to the report of the Special Master.

(27) Plaintiff excepts to that part of said decree overruling plaintiff's Exception No. XXV to the report of the Special Master.

(28) Plaintiff excepts to that part of said decree adopting in its entirety the report of the Special Master.

(29) Plaintiff excepts to that part of said decree striking from the files plaintiff's replies to the answers and amended answers of defendants Northern Pacific Railway Company and Northwestern Improvement Company and plaintiff's reply to the answer of the defendant Northern Pacific Railroad Company.

(30) Plaintiff excepts to that part of said decree quashing the return of service of summons upon Edward A. Gay as an officer of the Northern Pacific Railroad Company as reorganized in 1875.

807 (31) Plaintiff excepts to that part of said decree dismissing from plaintiff's complaint Subdivisions VI, VII, VIII, all of IX except the first two paragraphs thereof, all of X except the third paragraph thereof, XI, XII, XIII, XIV, XV, XVIII, XIX, XXVI, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXV, XXXVI, and XXXVIII, or any of said subdivisions or parts thereof, the exception being to the dismissal of said subdivisions both jointly and severally.

HARRY W. BLAIR,
Assistant Attorney General.
J. M. SIMPSON,
United States Attorney for the Eastern District of Washington.
J. CRAWFORD BIGGS,
Special Assistant to the Attorney General.
E. E. DANLY,
Special Assistant to the Attorney General.

The foregoing exceptions are allowed. This Oct. 3rd, 1935.

J. STANLEY WEBSTER,
District Judge.

[File endorsement omitted.]

808 In United States District Court

Defendants' exceptions

Filed Oct. 3, 1935

The defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation, except to that portion of the order of the Court entered herein on October 3, 1935, in which the Court overrules said defendants' exception to the conclusion of the Master that defendants' demurrer to subdivision XXII of the bill of complaint should be overruled, and except to that portion of the order of the Court which adopts that portion of the report of the Master, which relates to Portage, Winnebago & Superior grants and appears on pages 88 to 97, inclusive, of said report.

GRAFTON MASON,
D. R. FROST,
D. F. LYONS,
F. J. MCKEVITT,
Solicitors for defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation.

The foregoing exceptions are allowed. This 3rd day of Oct. 1935.

J. STANLEY WEBSTER,
District Judge.

[File endorsement omitted.]

809 In United States District Court

Notice

Filed Dec. 31, 1935

To Messrs. HARRY W. BLAIR, J. M. SIMPSON, J. CRAWFORD BIGGS, and E. E. DANLEY:

Please take notice that on the 13th day of January 1935, at 2 o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard, the undersigned defendants will move the Court before the Hon. J. Stanley Webster, Judge of said Court, at the Federal Building, City of Spokane, Washington, for an order resettling or amending the order of October 3, 1935, which, among other things, overruled all exceptions to the Special Master's report and adopted said report in its entirety, so that

the order with reference to said report shall reserve decision on all questions with respect to the defenses of innocent purchasers for value interposed by the defendants, Bankers Trust Company, as Trustee, and City Bank Farmers Trust Company, as Trustee.

The particulars in which the undersigned defendants move that said order be resettled or amended are these:

(a) That there be added at the end of paragraph 1 of the order after the word "overruled" the following:

", except that there are reserved until the final hearing all questions with respect to the defenses of innocent purchasers for value interposed by the defendants Bankers Trust Company, as Trustee, and City Bank Farmers Trust Company, as Trustee."

(b) that there be added at the end of paragraph 2 of the order after the word "entirety" the following:

", except for the matters reserved as just provided."

This motion is based upon all of the files and records herein and upon the attached affidavit of Alfred N. Heuston, one of the solicitors for Bankers Trust Company, as Trustee.

Dated: December 31, 1935.

WHITE & CASE,
TAYLOR, BLANC, CAPRON & MARSH,
F. J. MCKEVITT,
Solicitors for Defendants Bankers Trust Company, as Trustee, and City Bank Farmers Trust Company, as Trustee.

STATE OF NEW YORK,
County of New York, ss:

Alfred N. Heuston, being first duly sworn, doth depose and say that:

810 1. I am one of the solicitors for the defendant Bankers Trust Company, as Trustee under the Prior Lien Mortgage of the defendant Northern Pacific Railway Company. The motion in support of which this affidavit is submitted is made by both said defendant Bankers Trust Company, as Trustee, and by City Bank Farmers Trust Company, as Trustee, both of said defendants occupying identical positions with respect to said motion.

2. I appeared before the Special Master when he had under consideration the matters referred to him by the Court and presented the argument of defendant Bankers Trust Company, as Trustee, with respect to its defenses which were separate and additional to those of the defendant Railway Company, which defenses include those of bona fide purchaser for value; and I appeared before the above entitled Court and argued in support

of the exceptions filed by defendant Bankers Trust Company, as Trustee, and in opposition to the exceptions filed by the plaintiff to the Special Master's report insofar as such exceptions related to said defenses of the Trust Companies. George S. Mittendorf, Esq., of the firm of Taylor, Blanc, Capron & Marsh, appeared and argued such matters on behalf of defendant City Bank Farmers Trust Company, as Trustee.

3. At the hearing on exceptions to the Special Master's report, the Court announced that, inasmuch as it would not be necessary for the Court to pass upon the separate and additional defenses of the Trust Companies if the Court sustained the report of the Special Master, the Court would reserve consideration of such defenses of the Trust Companies until the final hearing. In the opening brief of the plaintiff, on page 637, this ruling is referred to, and the plaintiff states that it is accordingly making no mention in its brief of such points. The Government made no oral argument upon these matters. No briefs were filed with the Court by the defendant Trust Companies.

4. The defendant Trust Companies feel that unless the order of October 3, 1935, is resettled or amended so as to reserve ruling in said defenses, the Trust Companies may be at a disadvantage and under the handicap of endeavoring to show at the final hearing, or upon appeal, that the Court was not, in referring generally in the opinion and in the order of October 3, 1935, to the exceptions filed by the defendants or the briefs submitted in support thereof, intending to pass upon the separate and
811 additional defenses interposed by the defendant Trust Companies.

5. Because the position of the defendant Trust Companies and the bondholders is different from that of the Railway Company with respect to the bona fide purchaser for value defenses, the importance of which will depend upon the final rulings in the case, and because the matter was not fully argued and was not briefed at all, the defendant Trust Companies request that the order of October 3, 1935, be resettled or amended so as to provide that decision is reserved on the matters specified in the notice of motion.

6. Further deponent saith not.

ALFRED N. HEUSTON.

Subscribed and sworn to before me this 19th day of December, 1935.

WEBSTER SANDFORD,
Notary Public, New York Co., N. Y. Co.
Clk's No. 891, N. Y. Co. Register's No. 571212.

[File endorsement omitted.]

812 In United States District Court

Order amending order of Oct. 3, 1935

Filed Jan. 29, 1936

On motion of the defendants, Bankers Trust Company, a corporation, and City Bank Farmers Trust Company, a corporation, heretofore filed in this Court and heard before me the 13th day of January 1936; plaintiff appearing by one of its solicitors, J. M. Simpson, United States District Attorney for the Eastern District of Washington; the defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, Northwestern Improvement Company, a Corporation, Bankers Trust Company, a corporation, and City Bank Farmers Trust Company, a corporation, appearing by one of their solicitors, F. J. McKevitt; the Court having heard the argument and being fully advised in the premises, it is now

Ordered, adjudged, and decreed that that certain order heretofore entered in the above entitled Court on the 3rd day of October 1935, be and the same is hereby amended to read as follows:

"This cause came on to be heard upon the report of the Special Master, filed herein on the 31st day of May 1933, and the exceptions of the various parties thereto; and the Court having heard argument and being fully advised in the premises, it is now ordered, adjudged and decreed as follows, viz:

"1. All the execptions of plaintiff and of defendants be and they hereby are overruled, except that there are reserved until the final hearing all questions with respect to the defenses of innocent purchasers for value interposed by the defendants Bankers Trust Company, as Trustee, and City Bank Farmers Trust Company, as Trustee.

"2. The report of said Special Master be and hereby is adopted in its entirety, except for the matters reserved as just provided.

"3. The replies of plaintiff to the answers and amended answers of defendants, Northern Pacific Railway Company and Northwestern Improvement Company, and the reply to the answer of the Northern Pacific Railroad Company, be and they hereby are stricken from the files of the Court.

"4. The return of service of summons upon Edward A.
813 Gay, as an officer of Northern Pacific Railroad Company as reorganized in 1875, be and the same hereby is quashed.

"5. The following subdivisions and portions of subdivisions of the complaint be and they hereby are dismissed from said complaint: Subdivision VI, VII, VIII, all of IX except the first two paragraphs thereof, all of X except the third paragraph

thereof, XI, XII, XII, XIV, XV, XVIII, XIX, XXVI, XXVII (granted on application of plaintiff), XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXV, XXXVI, and XXXVIII.

"It is further ordered and decreed that the Special Master proceed with the final hearing as provided in the order of appointment entered herein February 25, 1932."

Done in open Court this 29th day of January 1936.

J. STANLEY WEBSTER,
District Judge.

O. K. as to form,
J. M. SIMPSON,
United States Attorney.
F. J. MCKEVITT,
Solicitor for Northern Pacific Railway Co., Northern Pacific Railroad Co., Northwestern Improvement Co., Bankers Trust Co. and City Bank Farmers Trust Co.

[File endorsement omitted.]

814 In United States District Court

Motion to amend order of reference

Filed April 21, 1936

Comes now the plaintiff in the above-entitled cause and respectfully moves the Court to amend its order of reference entered on February 25, 1932, ratified by the order of this Court entered on October 3, 1935 (as amended by order entered on January 29, 1936), as follows:

That the Special Master proceed with the hearing of said cause and take evidence relative to all matters therein not covered by the Special Master's Report filed herein May 31, 1933, except evidence relative to the values of lands in controversy and the amount of compensation due plaintiff or any of the defendants, hear argument of counsel thereon, and report to this Court his findings of fact and conclusions of law and the evidence taken, together with recommendations for an order or decree thereon, said findings and conclusions to be subject to review by this Court.

After the findings and conclusions and recommendations have been reported to this Court and any exceptions thereto have been heard and determined and an order or decree thereon has been entered, in the event no appeal from any order or decree in this cause shall be taken within 60 days thereafter, said Special Master shall proceed with the final hearing of said cause and

make full and complete findings of fact and conclusions of law and report the same to this Court together with the evidence taken, said findings and conclusions to be subject to review by this Court.

HARRY W. BLAIR (J. C. S.),
Assistant Attorney General.
J. M. SIMPSON,
United States District Attorney.
J. CRAWFORD BIGGS,
E. E. DANLY,
NORMAN M. LITTELL,
Special Assistants to the Attorney General.

[File endorsement omitted.]

815 In United States District Court

Order Amending Order of Reference

Filed April 21, 1936

On motion of the plaintiff filed in this Court, plaintiff appearing by two of its solicitors, J. M. Simpson, United States District Attorney for the Eastern District of Washington, and E. E. Danly, the defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation, appearing by one of their solicitors, D. R. Frost; Bankers Trust Company, a corporation, and City Bank Farmers Trust Company, a corporation, appearing by one of their solicitors, F. J. McKevitt; the Court having heard argument on the motion on this 21st day of April 1936 by consent of all parties, and no objection being made by any of the parties to the granting of the motion and the Court being fully advised in the premises, it is now

Ordered, adjudged, and decreed that that certain order of reference heretofore entered in the above entitled cause on February 25, 1932, ratified by the order of this Court entered on October 3, 1935 (as amended by an order entered on January 29, 1936) be and the same is hereby amended as follows:

That the Special Master proceed with the hearing of said cause and take evidence relative to all matters therein not covered by the Special Master's Report filed herein May 31, 1933, except evidence relative to the values of lands in controversy and the amount of compensation due plaintiff or any of the defendants, hear argument of counsel thereon, and report to this Court his

findings of fact and conclusions of law and the evidence taken, together with recommendations for an order or decree thereon, said findings and conclusions to be subject to review by this Court.

After the findings and conclusions and recommendations have been reported to this Court and any exceptions thereto have been heard and determined and an order or decree thereon has been entered, in event no appeal from any order or decree in this cause shall be taken within 60 days thereafter, said Special
816 Master shall proceed with the final hearing of said cause and make full and complete findings of fact and conclusions of law and report the same to this Court together with the evidence taken, said findings and conclusions to be subject to review by this Court.

Done in open court this 21st day of April 1936.

J. STANLEY WEBSTER,
United States District Judge.

Form approved,
D. R. FROST,
F. J. McKEVITT.
E. E. DANLY.

[File endorsement omitted.]

817 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Master's report on adjustment

Filed July 26, 1937

SIR: I have the honor to transmit herewith my report on the adjustment of the Northern Pacific Railroad grants under the amended order of reference of April 21, 1936, together with the testimony and exhibits.

I hope that Your Honor and counsel will find the several subjects adequately treated in what I have written.

Respectfully submitted.

F. H. GRAVES,
Special Master.

July 23, 1937.

The Honorable J. STANLEY WEBSTER,
Judge of the District Court of the United States for the Eastern District of Washington.

THE TWO GRANTS

The grant of land under the Act of July 2, 1864, 13 Stat. 365, Sec. 3, in aid of the road from Lake Superior to Puget Sound, is in these words:

"Sec. 3. And be it further enacted, That there be and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad lines, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: * * * Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, and within fifty miles thereof, may be selected as above provided: And provided, further, That the word 'mineral', when it occurs in this act, shall not be held to include iron or coal. * * *"

The Joint Resolution of May 31, 1870, 16 Stat. 378, adopts the grant of 1864, and applies it to the line from Tacoma to Portland. It provides further as follows:

819 "and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four."

The two enactments will be referred to frequently as the "act" and the "resolution," respectively.

TERMINOLOGY

In the administration of railroad grants a certain terminology has grown up in the Land Office. That terminology may as well be stated and explained here as elsewhere, because it is used in the testimony and exhibits in the case, and in the argument of counsel before me, and will be employed in this report. The irregular quadrilateral formed by the terminal limits at Ashland and Pasco under the grant of 1864 for the main line and at Pasco and Tacoma for the branch line over the Cascades; and by the lateral limits of 40 miles on either side of the road through Territories and 20 through States; and the like quadrilateral formed by the grant contained in the resolution of 1870, between Portland and Tacoma, are termed the place limits, sometimes the primary limits, and the lands comprehended within these limits are termed the place lands, sometimes the primary lands.

Lands lying within the place or primary limits, but "granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of" prior to the time the line of the
820 road opposite to which such lands lay was definitely fixed, are said to have been "lost" to the grant. In lieu of the lands so lost, the company was entitled to select other lands in odd-numbered sections within the distances specified by the act and resolution, known as the indemnity limits or indemnity belts.

The 10-mile strip provided by the act, in which selection for losses might be made, is termed the first indemnity belt. The

10-mile additional strips authorized to be laid down under certain restrictions where necessary by the resolution, and which were laid down in the states and in certain territories, are called the second indemnity belt. By the act the company might indemnify itself for mineral losses out of any odd-numbered sections lying within 50 miles of the road on either side. This is called the mineral indemnity belt. Certain peculiarities of this belt should be noted. Because of the restrictions to 50 miles, the exterior limit of this belt through territories is co-terminous with the exterior lines of the first indemnity belt, and it follows, hence, that no mineral selections could be made in the second indemnity belt in those portions of the line. In the states, however, the exterior line of the mineral belt fell 10 miles beyond the limit of the second indemnity. On its face, it covered the place as well as the first indemnity in the territories and the extended limits in the states, with the result that selections for mineral losses might be made in the place limits. The Land Department has permitted such selections in certain cases under an opinion of Attorney General Wickersham, of date July 24, 1912, reported in 41 L. D. 571. Whether this ruling of the Attorney General and the consequent practice of the Land Office was correct is one of the questions in this case. It, of course, can have applica-
821 tion only to cases where lands in the place limits had been reserved by the government for some purpose, or occupied by settlers under the land laws of the United States, at the date of definite location, with the consequence that such lands did not pass under the grant, and thereafter were restored to the public domain for whatever reason. In many instances the company has claimed, and has been allowed, the right to make selections for mineral losses from such restored lands.

Prior losses mean losses which occurred in the place limits prior to the date of the act. Subsequent losses mean those occurring between the date of the act and the date of definite location of a given section of the road. Both prior and subsequent losses might be satisfied in the first indemnity belt anywhere along the line without reference to the state or territory in which they had occurred.

N. P. exhibit 131, a map of the route of the road from Ashland on Lake Superior to Tacoma, and from Tacoma to Portland, and of the land grant limits pertaining thereto, illustrates the grants conferred by the act and the resolution. The yellow strip represents the belt 40 miles in width on each side of the road through the territories and 20 miles on each side through the states, constituting the primary or place limits. The pink strip on each side represents the first indemnity belt created by the act. The

green strips represent the second indemnity belt created by the resolution. The brown strips in the states represent the additional limits not more than fifty miles from the road within which selections might be made in lieu of mineral losses. The red areas within the place limits represent tracts originally lost to the grant, and afterward restored to the public domain.

822 No second indemnity limits exist in North Dakota because at the date of final location in that territory there was no deficiency, that is, the lands available in the first indemnity limits exceeded the losses in the place limits. The same condition existed in Washington as to the grant by the act of 1864, that is, the grant in aid of the construction from the east to Pasco and thence to Tacoma. Whether second indemnity limits, though shown on the exhibit for the grant in Washington, by the resolution, that is, the grant in aid of the construction from Kalama, north of Portland, to Tacoma, were authorized, is a point in issue hereafter to be discussed. Place limits and first indemnity limits appurtenant to construction in Washington under the act extend into Oregon, for those limits depend upon the location of the route of the road and extend for the prescribed distance laterally regardless of an intervening state or territorial boundary. The same condition as to first indemnity limits prevails in Wyoming with respect to construction in Montana, but the second indemnity limits resulting from the Montana deficiency do not extend into Wyoming because the resolution confines additional indemnity for any state or territory in which the grant is deficient to "such State or Territory." The second indemnity limits in Idaho to the north do not extend for the full 10 miles because intercepted by the international boundary.

The lateral lines of the several limits are shown in continuous straight or curved lines. In fact, as other exhibits disclose, the lateral lines are jagged, following sectional and subdivisional boundaries pursuant to a necessarily arbitrary rule of the General Land Office about which there is no controversy. Arcs were described at specified intervals 20, 40, 50, or 60 miles from the line of road, as the case might be, tangents to such arcs

823 were drawn, and the lateral lines were drawn through the tangents on sectional and sub-divisional lines in such a way as to balance the gains and losses. The terminal limits also were established by arbitrary rule. A line was drawn from some selected point on the road to the terminus and a perpendicular to that line, erected at the terminus, became the terminal limit. Such terminal limits may be seen at Ashland, Wisconsin, and at Pasco, Washington, for the grant by the act for the main line, at Pasco and Tacoma for the branch line, and at Portland

and Tacoma for the grant by the resolution. The exhibit also indicates the dates of definite location of the several sections of the road under both grants, and the dates at which the several indemnity limits in each of the states and territories were laid down.

Prior to 1879 all railroads having land grants with indemnity rights were allowed to make indemnity selections in bulk, that is, without assigning a specific loss for each tract selected as indemnity. Thereafter, subject to exceptions, they were required to specify their losses and selections tract for tract. The history of Land Office practice in this respect is recounted in La Bar v. Northern Pacific, 17 L. D. 406. In the process of selecting indemnity the losses are sometimes called base, and the process itself is called assignment of losses or assignment of base. The lists of the losses and of the indemnity lands selected are called selection lists, several of which are in evidence.

In this report all losses other than mineral will at times be referred to as general losses. A distinction is to be observed with respect to the character of lands which might be selected as indemnity for the two classes of losses. While mineral lands were excluded from the operations of the act, it was
824 provided that the word "mineral" should not be held to include iron or coal, and hence such lands could be selected in lieu of general losses. As, however, by the third proviso, selections for mineral losses were limited to agricultural lands, iron and coal could not be taken for mineral losses. This is obviously correct irrespective of the definition which shall ultimately be given to the phrase "agricultural lands" as used in that proviso.

Occasionally lands not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, have been referred to as "free" lands, and I shall in this report at times employ that term to save repetition and circumlocution. Of course, this term does not have any reference to mineral lands or mineral losses. These are in a class by themselves.

All free lands within the place limits and all lieu lands properly selected by the company within indemnity limits, are, in the process of adjustment, said to be charged to the grant.

ESTABLISHED PRINCIPLES

Under these grants certain principles are firmly established and are not in dispute. The grants of land in place limits are in praesenti, I quote here for precision Mr. Justice Field's definition of what is meant by that phrase in St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U. S. 1, 5:

"As seen by the terms of the third section of the act, the grant is one in praesenti, that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, preemption, or other disposition previous to the time the definite route of the road is fixed. The language of the statute is 'that there be, and hereby is, granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it.
825 The words also import a transfer of a present title, not a promise to transfer one in the future.

"The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once indentified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one in praesenti; that is it say it is of that character as too all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.

"This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion."

In that sense the lands in indemnity limits were not "granted." The grant was rather of a right or power. That right or power is protected, however, under the due process clause of the Constitution, as much as in the grant of the lands in place. No right to any specific tract of land vested in the railroad until it had been selected, and thereupon, when properly selected and allowed, the company became entitled to the selected lands by the same right and with the same vigor as it held the lands in place. Again for precision I quote the language of Mr. Justice Van Devanter in Payne v. Central Pacific Railway Company, 255 U. S. 228, 236:

"The ultimate obligation of the Government in respect of the indemnity lands is on the same plane as that respecting the lands in place. The only difference is in the mode of identification. Those in place are identified by filing the map of definite location, and the indemnity lands by selections made in lieu of losses in the place limits."

It may be added here, too, that until the time of such selection, all lands in indemnity belts were open to settlement under the land laws of the United States, and thus might be lost to the right of selection by the railroad company. Hewitt v. Schultz, 180 U. S. 139.

826 The duties of the Secretary of the Interior with respect to the provision of the act authorizing the company to select indemnity under his "direction" are comprehensively stated by Mr. Justice Van Devanter in Payne v. Central Pacific Railway Company, following the quotation just given above:

"The selections are to be made by the grantee, not by the Secretary of the Interior. True, the act provides that they shall be made under the Secretary's directions, but this merely applies to them the general rule, announced in Rev. Stats., §§ 441, 453, 2478, that the administrative execution of all public land laws is to be under his 'supervision' and 'direction.' Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155, 166. Its purpose is to make sure that, in accord with that power of supervision and direction, he is to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, that no indemnity is given except for actual losses of the class intended, and that the lands selected are such as are subject to selection. But of course it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act."

Obviously the Secretary's duty may be, and ordinarily must be, exercised by general regulations, but it should be borne in mind that these regulations cannot have the effect of curtailing or enlarging the rights of the company as granted by the act and resolution. I make this observation because in the testimony and in some of the Land Office decisions there is a tendency to exalt the regulations and to assign reasons of convenience for their application wholly beyond the purpose for which they were made.

SOME PRELIMINARY RULINGS

Certain questions in connection with the indemnity belts that will arise at various places in this report have not been settled, and I think it will be more convenient to state and determine them here than elsewhere. The United States says, and
827 the Land Department has held, that only subsequent losses can be indemnified in second indemnity limits. I do not think this is sound. The language of the resolution authorizing second indemnity limits uses the term "subsequent to the passage of the act" only as a measure of the quantity of losses that may be satisfied in second indemnity, not as a definition of the character of those losses. So long as the selections made in second indemnity do not exceed the subsequent losses, both prior and subsequent losses may be satisfied in second indemnity. This seems to me plain.

On the other hand, the company insists, or, perhaps it were better to say, suggests, that no warrant is to be found in the terms of the resolution, limiting the selection in second indemnity to losses arising in the state or territory to which the limits appertain. I hold that the phraseology employed, and the spirit of the provisions of the resolution authorizing a second indemnity belt, have the effect of restricting the losses to be there satisfied to those originating in the same state or territory. I do not think that I am called upon to enlarge upon this ruling or to further explain my meaning, because the company makes no argument upon the point, but only a suggestion as indicated above. Probably it makes no difference in the result.

While title to the lands in the place limits vested immediately upon filing of the map of definite location whether the lands had been surveyed or not, title to land in the indemnity limits did not attach until the lands had actually been selected, and under the rulings of the Land Office such selections could not be made prior to survey. Several successive statutes provided for the survey of public lands in the states and territories through which the road ran, but the progress of the sur-
828 veys did not by any means keep up with the construction of the road, nor proceed fast enough to enable the company to make rapid selections. The Government has suggested at various places in its testimony that these delays were, in part at least, due to the fault of the company in failing to make deposits or payments as required by the various statutes. In argument before me, however, this point is not urged, and I do not know whether it is intended to be waived. In any event, I am convinced by the testimony that the company acted in respect of these surveys with reasonable diligence. It is probable that in some cases it might have proceeded a little more promptly, but the successive statutes were more or less difficult of application, and I think, all things considered, that the company did the best it could under the conditions. Mr. Frost, in argument to me, said that, notwithstanding certain allegations in its pleadings, and certain suggestions made in the taking of testimony, it did not criticise the government in respect of these surveys, and that he presumed it proceeded as fast as could reasonably be expected under the circumstances. I think the evidence fully justifies that concession. I should so hold even if it were not conceded.

"THE FOREST RESERVE CASE"

By the Act of March 3, 1891, 26 Stat. 1103, the United States initiated the policy of setting apart public lands in national forests. From that act is derived the first paragraph of U. S. C. A.,

Title 16, Sec. 471, relating to the establishment and administration of national forests, as follows:

"The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, (in) any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof."

829 In 1892 5,120 acres of odd-numbered sections within the second indemnity limits of the Northern Pacific grant in Montana were withdrawn pursuant to that statute. More extensive withdrawals were made in 1898. Withdrawals for national forests and other purposes continued to be made, so that up to the present time 3,369,627.95 acres of odd-numbered sections within the indemnity limits of the grant of 1864, and 368,729.50 acres of odd-numbered sections within the indemnity limits of the grant of 1870 have been included in the withdrawals for forest reserves and other governmental purposes. The validity of such withdrawals of indemnity lands pervades the entire case, for of the specific lands that are possibly available to meet the deficiencies in the grants, and for which in this proceeding the company seeks compensation, only about 700 acres within the grant of 1864, and about 2,000 acres, as computed by the company, or 7,000 acres, as computed by the government, within the grant of 1870, lie outside the lands so withdrawn. Govt. exhibit 88 is a map showing the lands withdrawn for national forests and for the Tongue River Northern Cheyenne Indian Reservation.

On several occasions subsequent to 1898 the company had filed selection lists for the purpose of obtaining indemnity lands within the withdrawn areas in lieu of place losses, but the Land Office had rejected or withheld such selections because of the withdrawals. In 1905 such a list of mineral losses, aggregating 5,681.76 acres, was filed for the selection of lands in the first indemnity limits in Montana within an area temporarily withdrawn under executive order, and afterward included in the Gallatin National Forest. Through inadvertence the local land office approved the list, and the lands were patented to the

830 company. Later, on discovery of the fact, the United States instituted a suit for the cancellation of the patent. The case reached the Supreme Court of the United States, and is the often-referred-to Forest Reserve case, United States v. Northern Pacific Railway Company, 256 U. S. 51.

By the act of March 3, 1887, Congress had directed the Secretary of the Interior to immediately adjust all railroad land

grants in accordance with the decisions of the Supreme Court. On March 26, 1906, the Commissioner of the General Land Office addressed a letter to the Secretary of the Interior transmitting a statement of the Northern Pacific grants, known as the Jones adjustment. That report showed a deficiency in the 1864 grant of 3,666,451.74 acres, and in the 1870 grant of 532,029.73 acres. Without undertaking here to finally interpret the Forest Reserve case, the Supreme Court there said that whether the withdrawal of the lands then in controversy was valid, depended upon whether the grant of 1864 was deficient at the time of the temporary withdrawal, that is, whether, aside from the withdrawn lands, sufficient lands remained, or remained and were available, to satisfy the remaining losses. Counsel in that case had stipulated that the deficiency shown by the Jones adjustment existed, but since it did not appear that that report or adjustment had been called to the attention of the Secretary of the Interior, who alone by the Act of 1887 was authorized to adjust the grant, it was not accepted by the Court as author'ative, and the case was remanded in order to permit the parties to supplement the record by a proper showing as to whether sufficient lands remained outside the withdrawn lands to satisfy the determined deficiency.

831 In my former report, pp. 13–14, I related briefly the proceedings following the Forest Reserve case and leading up to the passage of the act of June 25, 1929, under which this suit was brought. At pp. 20–23 I stated the substance of the several provisions of that act. I think it will not be necessary to restate any of those things here.

THE PLEADINGS

At pp. 23–25 of my former report I undertook, in general terms, to define the pleadings and to classify the several paragraphs of the bill. That was done, however, with reference to the matters covered by that report, and I think it may be well to make a brief statement of the pleadings so far as concerns the matters here to be considered. Certain of the allegations of the bill, such as those pertaining to failure to subscribe for the requisite amount of stock, the reorganization of 1875, the reorganization of 1896, the circuitous route through Washington, the claim of forfeiture for failure to comply with the condition subsequent requiring the company to construct the road on time, and perhaps some others of the same sort, have all been disposed of. Most of those related to such fundamental defects as were supposed to defeat the grant in whole or in part, and so were properly and necessarily pleaded.

Certain other allegations related to the admeasurement of the grants, such, for instance, as the conflict with the Portage, Winnebago, and Superior Railroad, the lateral errors in Montana and Idaho, and the terminal errors at Ainsworth and Portland. All these latter allegations and others of the same nature, I assumed in that report were necessary to be pleaded as going to the adjustment of the grant. No suggestion was made by counsel
832 in argument before me, nor do I think before Your Honor, upon this point, and it was not material whether they were necessarily pleaded, nor what was a proper pleading. I took the allegations in the bill and answer as they were on that subject, and I believe that Your Honor so accepted the pleadings, neither counsel contending anything about it.

Now, however, we are confronted with a situation requiring a determination of what pleadings are necessary for the purpose of the adjustment, which is the matter now under consideration. Again, in the recent argument before me, no suggestion was made by counsel on either side, upon the subject, and no authorities were cited. Nevertheless, it must be determined preliminarily because many of the important questions presented upon the adjustment are not mentioned in the pleadings in any way; for instance, on the part of the United States, the question whether, under the resolution, lateral limits on the Tacoma-Portland line were authorized and the question of what is "agricultural land" within the meaning of that term as used in the provision for indemnity for mineral losses; and, on the part of the company, the request for reassignment of base. The subject of the Tacoma Overlap is likewise not pleaded.

I am now convinced that no pleading upon the subject of the adjustment is necessary, nor, I think, is proper, except an allegation that the grants are unadjusted and that the act under which the suit is brought requires this court to adjust them; and I think that in that adjustment, quoting from page 22 of my former report, "every question from the organization of the company to the date of the Act that had been, or that now might be raised, should be presented to the Court and finally determined."

833 By such a pleading the whole subject of adjustment, as distinguished from such fundamental questions as were supposed to defeat the grants, would have been brought into the case. Whatever else adjustment may mean, an adjustment as required by the act of June 25, 1929, means that every question affecting the administration of the grants from the beginning of that administration to the date of the act should be brought under review, and should be determined by the court, even though in so doing it might become necessary to modify, overrule or

disapprove the doctrines, practice, and orders, made from time to time by the General Land Office in the administration of the grants.

The title of the Act of June 25, 1929, speaks of an "adjustment." It is as follows:

"An Act To alter and amend an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route,' approved July 2, 1864, and to alter and amend a joint resolution entitled 'Joint resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes,' approved May 31, 1870; to declare forfeited to the United States certain claimed rights asserted by the Northern Pacific Railroad Company, or the Northern Pacific Railway Company; to direct the institution and prosecution of proceedings looking to the adjustment of the grant, and for other purposes."

In the fifth section the Attorney General was authorized and directed to institute and prosecute such suit or suits as might, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of the company, and to have all controversies and disputes mentioned in the act respecting the operation and effect of the grants judicially determined and a full "accounting" had.

834 In the prayer of the bill in this case the phrase "an adjustment and accounting" is employed. I take it that all of these terms mean practically the same thing. I do not mean that this adjustment is an accounting, as that term is generally used. I mean only to say that in my view the proceedings in the adjustment of these grants are analogous to an accounting, and that the same principles of pleading are to be applied as are applied in accounting cases in equity, and to certain other classes of equitable suits discussed in the cases hereafter cited.

A bill for an accounting pleads the occasion and necessity for the accounting, but does not set forth the items of the account. This, I think, is fundamental. In 1 C. J. S. 669, under the head of equitable accounting, it is said:

"Facts showing the right to an accounting must be specifically alleged if known to plaintiff, but the items of account need not be alleged, * * *"

An exception exists in the case of a suit against one for whom plaintiff is acting in a fiduciary capacity, where plaintiff should present his account with his bill.

In Calbeck v. Herrington (Ga. 1930), 152 S. E. 53, 56, it is said:

"In an equitable proceeding to obtain an accounting, the plain-

tiff is not obliged to set out an itemized statement showing the amounts claimed, or to aver how much is due by the defendant upon an accounting; but all the petitioner in such a proceeding has to aver are facts sufficient to indicate that something will be found to be due to plaintiff by defendant."

The procedure indeed is implied in Equity Rule 63, requiring parties accounting before a master to bring in their respective accounts in the form of debtor and creditor. The parties here by their exhibits have, substantially, done this.

Therefore I shall proceed in making this adjustment upon the proof as submitted, upon the principles of the law of the
835 grant, and upon the doctrines of equity, in determining the final result. I should add that while the United States objected to the offer of evidence by the defendant touching the reassignment of base, and the Railway Company objected to the Government's evidence of error in the survey of the Montana Place limits, for the reason in each case, that the matter was not pleaded, yet in argument and in the briefs filed before me neither makes any insistence upon the point.

Upon the question of the necessity of pleading specific items, my greatest concern arose with respect to the Government's objection to the defendant's evidence in support of its request for reassignment of base. Doubt is removed, however, by reference to the principle which is evidently well settled, and which appears to me to be sound and satisfactory, that a party who demands an accounting submits himself to the result, and that no cross bill is necessary.

A general statement of the rule is found in 1 Am. Jur. 307:

"It is well settled that a suit in equity for an accounting constitutes an exception to the general rule in equity that affirmative relief will not be granted to a defendant unless he makes claim to it by a cross bill or counterclaim; that a bill, in such a suit, imports an offer on the part of the complainant to pay any balance that may be found against him; that upon such an accounting both parties are actors, and either is entitled, according to the result, to the aid of the court to recover the balance that may be found in his favor; and that it is not necessary for the respondent to file any cross bill, or to set up matter in his answer in lieu of such cross bill. But the rule that the defendant in a suit for an accounting may obtain affirmative relief without filing a cross bill or counterclaim therefor does not apply where the relief granted is not within the scope of the complainant's bill."

A case frequently cited to this point is Goldthwaite v. Day, 149 Mass. 185, 21 N. E. 359, where the court, through Holmes, J., says, 21 N. E. 360:

836 "When a bill in equity is brought upon a mutual account, the cross-items in favor of the defendant are not matters of set-off. A set-off is a creation of statute. It is an independent claim which the statute allows the defendant to consolidate with the plaintiff's action by pleading it, if he chooses, subject to substantially the same defenses as if he had sued upon it separately. On the other hand, a mutual account exists by agreement, and the effect of it is that the cross-items extinguish each other pro tanto at once, as they accrue. The only claim of either party is to the balance. (citing cases) When a bill is brought upon such an account, it implies that there are items on both sides, and that the balance is uncertain until ascertained by aid of the court. It seeks to have the balance ascertained and paid, and as a condition of being entertained it imports an offer, which formerly it was required to express, on the part of the plaintiff, to pay the balance if it should turn out against him. (citing cases) Under such a bill the defendant has nothing to plead in order to get the advantage of it. His claim is not an independent one, but is admitted and asserted by the plaintiff, provided the items on his side exceed those on the plaintiff's side. Those items are not to be pleaded except when the defendant sets out the whole account in his answer."

That case is followed in Downes v. Worch (1906), 28 R. I. 99, 65 Atl. 603, which is annotated in 13 Am. & Eng. Ann. Cas., at page 648, the introductory paragraph of the note being as follows:

"It is a well-settled rule in equity practice that a defendant will be granted affirmative relief only on cross-bill. 5 Encyc. of Pl. & Pr. 634. There are, however, several exceptions to this rule, and it has been generally held that a defendant in a suit in equity for an accounting may have affirmative relief without filing a cross-bill or counterclaim therein. This exception is as well settled and uniformly applied as the rule itself."

In McManus v. Sawyer (D. C., S. D. N. Y., 1915), 231 Fed. 231, 238, Judge Learned Hand said:

"Moreover, it is a well-established rule that a party who demands an accounting submits himself to the result of the account if it goes against him. No cross-bill is necessary, and a decree may go for the balance either way."

The rule that in an accounting no cross-bill is necessary is doubtless an application of the general principle that he who seeks equity must do equity. In Farmers' Loan & Trust
837 Co. v. Denver L. & G. R. Co. (C. C. A., 8th Circ., 1903), 126 Fed. 46, a trustee under a railroad mortgage sought to foreclose upon after-acquired property consisting of a shop tract in Denver, upon which Hutchison had a mortgage which was

equitably prior. Hutchison was made a defendant and answered, but did not ask to foreclose. The court granted the complainant's prayer for foreclosure, but conditioned the relief with a provision that out of the proceeds Hutchison should first be paid the amount in which his mortgage was equitably superior to that of the complainant. The court said (p. 50):

"They say that this condition could not be imposed and that the decree ought to be reversed because Hutchison filed no cross-bill and prayed for no affirmative relief, while the decree directs that $21,049 and interest shall be paid to him out of the proceeds of the sale of the land. It is true that the general rule is that a cross-bill is indispensable to the grant of affirmative relief to a defendant in equity. But there is an exception to this rule, as well settled and uniformly applied as the rule itself. It is that no cross-bill is requisite to the application of the maxim that he who asks equity must do equity. It is that any relief, affirmative or otherwise, may be granted to a defendant which the principle embodied in this maxim requires the court to impose upon the complainant as a condition of granting all or a part of the relief he seeks, regardless of the pleadings which present it * * * In Morgan v. Schermerhorn, 1 Paige 544, 546, 19 Am. Dec. 449, the chancellor said that, where one comes to a court of equity to seek relief against a usurious contract, he must pay or offer to pay the amount actually due, before he will be entitled to an answer as to the alleged usury, and added, 'If a party comes here to seek equity, the court will compel him to do equity.' In Hudnit v. Nash, 16 N. J. Eq. 550, 553, 555, the second mortgagee exhibited a bill against Nash, the owner of the first mortgage, the third mortgagee, and the owners of the equity of redemption, in which he alleged that the first mortgage was usurious and void. Nash answered that he held the paramount lien, but he filed no cross-bill. The court said, 'But if a party comes into equity and asks relief, the court will compel him to do equity, although the defendant has not demurred to the bill; 'that the complainant's decree must be upon terms of paying Nash's mortgage; that no decree could be made except such as could be granted on the prayer of the complainant's bill and it entered a decree of sale of
838 the premises, and of application of the proceeds, first, to the payment of Nash's mortgage; second, to the payment of the mortgage to the complainant; and, third, to the payment of the third mortgage. This decree was affirmed in the appellate court. No cross-bills are required, to enable the defendants to secure decrees, establishing their rights in suits for accounting, partition, and specific performance. * * * In De Walsh v. Bramen, 160 Ill. 415, 43 N. E. 597, Braman exhibited a bill in equity to compel De Walsh and his trustee to convey

to him the title to two city lots. De Walsh answered that he had expended $1,118.77 in making improvements upon the property, which had not been repaid to him, but he filed no cross-bill. Nevertheless, the Supreme Court of Illinois conditioned the decree for a conveyance of the title to the complainant, with the payment to the defendant of the $1,118.77 and interest. The case in hand falls under the exception to the general rule which these authorities illustrate. Hutchison is not the actor here. He brought no suit, and he has asked no relief, save that he be hence dismissed, and that he have such other relief as may be just and equitable. He was called into the court below by the trust company, which besought that court to decree a sale of the shop tract, which was covered by his mortgage, and to apply the proceeds of that sale to the payment of the debt secured by the mortgage to the complainant. The decree below is founded upon this prayer of the trust company, not upon any claim or prayer of the defendant Hutchison. It directs the sale which the trust company sought, but conditions it with the payment out of the proceeds of the superior equitable lien of the defendant. It grants no relief to the defendant which the rules of equity jurisprudence did not, in the opinion of the circuit court, require it to impose as a condition of granting any part of the relief which the trust company asked with reference to the lien here in controversy. No cross-bill was requisite to warrant the action of the court below."

In Luckenbach S. S. Co. v. The Thekla, 266 U. S. 328, the Luckenbach Steamship Co. and the United States libelled the barque Thekla for a collision with the steamship F. J. Luckenbach and the owners of the Thekla filed a cross-bill against the steamer. Conceding that generally a counterclaim could not be asserted against the sovereign without its consent, the court, citing Goldthwaite v. Day, supra, said that the Government's libel was (p. 340):

"Like a bill for an account, which imports an offer to pay the balance if it should turn out against the party bringing the bill."

839 As indicated in the general statement quoted above, the rule has no application where the relief sought is not within the scope of complainant's bill. This is well illustrated in Wilcoxon v. Wilcoxon (Ill. 1902) 65 N. E. 229. In a former case the bill was for the dissolution of a partnership and the adjustment of the partnership accounts, and the rule was applied in its full meaning. In a later bill the plaintiff in error sought to annul the articles of partnership, and, to excuse laches, pleaded the former proceeding upon the theory that the relief sought by the later bill could have been granted in the former proceeding

without a cross-bill had not the defendants in error, over his objection, abandoned it. The court said that in actions in equity for an accounting the prayer of the complainant authorizes the court, if the accounting shows the complainant to be indebted to the defendant, whom he has brought into the court, for the purpose of having the accounts between them judicially investigated and adjusted, to decree payment by the complainant accordingly, without a cross-bill on the part of the defendant; but that in the instance before it the relief sought by the later bill was entirely foreign to the scope and purpose of the earlier bill, and that therefore the relief could not have been granted in the former proceeding upon a cross-bill.

I find that all of the items presented at the hearings leading to this report are germane to the adjustment, and conclude that they are all property before me for consideration whether specially pleaded or not.

840 CONCESSIONS

Commencing with the Washington hearing in April and May of last year, the United States introduced exhibits in support of its claim that 63,197.96 acres, formerly within the Greater Sioux Indian Reservation, and which were restored to the public domain, and lay within the first indemnity limits in North Dakota, were patented to the company upon indemnity selections through mistake because the restoration of those lands was restricted to entry under the homestead and townsite laws. It likewise claimed that through mistake in drawing the lateral limits through portions of Montana and Idaho certain areas, aggregating 8,607.71 acres, lying entirely outside the limits of the grant, were conveyed to the company in error. It further claimed that the United States had erroneously patented to the company place and indemnity lands at Portland aggregating 4,295.52 acres, and at Ainsworth aggregating 61,536.25 acres, the terminal limits in each case having been laid down beyond the point of actual construction of the road. The government contended that its officers were without authority to convey these lands, and that the company should either reconvey or, in cases where it had transferred to bona fide purchasers, should pay value. The company contended, on the other hand, that since the grants had not been fully satisfied, these lands, though possibly patented in error, should be charged to the grant. During the arguments in February of this year, the government waived its claim for reconveyance or compensation, with the result that the lands in question are to be charged to the grant in precisely the same manner as the railway had considered them. Even without such concession, I should have held that, on plain prin-

ciples of equity, the foregoing classes of land should be
841 charged to the grant unless and except the Government were prepared to tender other lands to make up the deficiency. Since the case was submitted, the government has filed revised exhibits, in which the lands are charged to the grant, so that these questions are removed from further consideration.

In 1873 the railway company built westward as far as Bismarck on the Missouri River. The river itself was treated as the terminal limit for that section of the road. 27,488.62 acres to the west of the river were thus made to fall outside the lands earned by that construction. Thereafter, in 1876, the acreage in question was withdrawn from entry and included within the Little Sioux or Standing Rock Indian Reservation. In 1880 the road was extended on west past these lands, and they were apparently lost to the grant. In 1898, however, the Land Office drew a perpendicular terminal at Bismarck which threw the reservation lands opposite the earlier construction. The government claimed in effect that the new terminal should control; that title to the disputed lands passed upon the 1873 location; that the company was in position to recover them, and that the lands should be charged to the grant, while the company insisted that the river should be regarded as the terminal as originally considered; that the lands in dispute were lost to the grant; and that it was entitled to indemnity. At the September hearing the government announced that it would not insist upon its position, and in the revised exhibits these lands are treated as lost to the grant.

A question was raised in the pleadings as to whether certain lands fell within or without the Yakima Indian Reservation, depending upon which of two surveys correctly define the
842 southwestern boundary of the reservation. At page 210 of my previous report I pointed out that I was not able to determine from the pleadings whether the lands in question were in fact within or without the reservation. At the hearing in January and February of this year it was orally stipulated during the testimony of Mr. Schwarm, for the purposes of this suit, that about 22,000 acres should be considered as within the reservation, and, hence, not chargeable to the grant, that 831.95 acres should be considered as outside the reservation and properly selected by the company, and, hence, chargeable to the grant, and that about 1,100 acres should be considered as lying outside the reservation, but as having been put into a national forest, and hence subject to the same ruling that may apply to any other withdrawn lands. Effect to this stipulation is given in the revised exhibits.

In the earlier years of the administration of the grants the company was permitted to satisfy losses suffered by the 1870 grant in the indemnity limits in the 1864 grant, and vice versa. By decision December 20, 1897, reported in 25 L. D. 511, the Commissioner was instructed to administer the grants separately. The necessary rearrangement of losses is reflected in the exhibits, which treat the two grants as separate and distinct.

I shall proceed now to the adjustment.

GRANT OF JULY 2, 1864

RECONCILIATION AS TO EXTENT OF DEFICIENCY

The grant of 1864 is concededly deficient, in the sense that the losses have not been fully satisfied. The United States after all concessions, by its exhibit 103, revised, fixes the deficiency at 2,111,479.52 acres. The Northern Pacific by its corrected exhibit 132 fixes that deficiency at 2,572,800.87 acres. The difference between the two quantities is comprehended within the following items.

843 1. Portage, Winnebago & Superior conflict, 417,400.66 acres. The government deducts this area from the grant, while the railway treats it as having been lost to the grant, and thus as constituting proper base for indemnity. Indemnity was, in fact, allowed, but the government insists that other base be supplied, whereby the deficiency would be decreased.

2. Error in Montana place limits, 5,435.46 acres. The government shows that certain townships in Montana contain more than the conventional number of acres. The railway, admitting that excesses exist in the particular townships in that quantity, maintains that elsewhere in the grant many townships are deficient, and that no allowance should be made by reason of the greater or less number of acres per township. Of course, the effect is that the government's position would reduce the deficiency by that quantity. This contention must be distinguished from the Montana and Idaho lateral error involved in the concession mentioned above.

3. Lieu selections in indemnity limits, 38,485.23 acres. This acreage constitutes lands selected by the railway within the indemnity limits of the grant in lieu of lands relinquished under so-called relief acts, which entitled the company to make selections in lieu of lands relinquished by it to settlers. The United States argues that since the company could have made such selections elsewhere than in its own indemnity limits, it should be charged to the extent by which it thus depleted its limits, while the company contends that since, by the terms of the relief

acts, it was not excluded from its indemnity limits in making such selections, it should not be charged for making them there. The government's position would reduce the deficiency by the quantity involved. The company would disregard
844 the circumstance entirely as having no bearing whatever upon the quantity of the deficiency.

These three matters I shall now discuss, in order to arrive at what I consider a correct statement of the deficiency.

I

DEDUCTION FOR PORTAGE, WINNEBAGO & SUPERIOR GRANT

In my first report, speaking only to the pleadings, of course, and not to the actual facts, I held that upon the filing of the map of definite location by the Portage, Winnebago & Superior Railroad Company the title passed to it subject to be defeated only by failure to construct, and that thereby the lands fell within the terms of proviso 1 of Section 3 of the Act of 1864, deducting land previously granted, if the route of the Northern Pacific should be found upon the line of any other railroad route to aid in the construction of which lands had theretofore been granted, as far as such routes were upon the same general line.

By Your Honor's Order upon that report this became the law of the case. I cannot refrain, however, from calling attention to the case of United States v. Southern Pacific Railroad Company, 146 U. S. 570. In that case the senior grant was to the Atlantic & Pacific. A junior grant was made to the Southern Pacific. The former company filed its map of definite location. It did not, however, construct its road, and its grant was afterward forfeited to the United States. The Southern Pacific filed its map of definite location and did build its line upon that route, and thereupon claimed to have earned the lands which the Atlantic & Pacific had lost by its failure to construct. The Supreme Court, speaking by Mr. Justice Brewer, held square-toed that, by the filing of the map of definite location under the
845 senior grant, the title passed to that grantee, and, therefore, that the junior grantee could by no possibility get any of the land. It was held further that the failure of the Atlantic & Pacific to build, and the forfeiture of its grant, did not in anywise change this rule; that the forfeiture was not made for the benefit of the Southern Pacific, but for the benefit of the United States. In that case there was a proviso in the junior grant that its grant should be subject to the rights of the Atlantic & Pacific. This proviso, however, was not dealt with as having any bearing, although an impression is left that it might have

had some effect. In the subsequent cases of United States v. Colton Marble and Lime Company and United States v. Southern Pacific Railroad Company decided together and reported in 146 U. S. 615, that clause was held to have no bearing whatever upon anything but indemnity lands. Thus the determination that the place lands, by reason of the definite location of the Atlantic & Pacific line, did not pass to the Southern Pacific was not in anywise affected by that proviso. These cases, though cited to other points not requiring that they be critically examined, were not called to my attention at the previous hearing as touching this question; and I believe were not called to Your Honor's attention at the argument on the exceptions to my report. It is, therefore, with some degree of satisfaction that I am able at this time to point out how, precisely the determination of the question by the Supreme Court of the United States confirms the correctness of the view we took. Of course, under the proviso, in Section 3, which we are considering, it must be remembered that the land in question, by the very terms of the act, is deducted from the grant. Nothing was received, and, hence, no indemnity
846 could be claimed. In that respect the cases differ; but upon the proposition that on filing of the map of definite location title passed to the senior grantee as of the date of its grant so that nothing could pass to the junior, the cases are identical.

At this point and upon the question of fact involved Govt. exhibit 76 shows the precise situation. Area A and Area B together constitute an aggregate of 370,378.05 acres, approximately the quantity alleged in the bill. The United States now claims that not only areas A and B, but also area C should likewise be deducted from the grant, bringing the total deduction to 417,400.46 acres. In argument Mr. Frost maintained that, while the two roads were parallel down to range 11 east, from that point, by reason of the divergence in a northwesterly direction to Bayfield of the located Portage road and the almost directly eastern course of the Northern Pacific to Ashland, they were not on the same general route. I hold that they are. We must consider the condition of the country at this time, and what Congress had in mind. There were no railroads in that portion of Wisconsin. The grant to the Portage road was to afford railroad facilities for that portion of Wisconsin along Lake Superior. The distance between the termini of the two roads is about 17 miles. While, as it appears on the map, it looks like a very sharp departure from parallelism, I think it must be said certainly that 17 miles difference between the termini does not take it away from the same general direction, using the word "direc-

tion" as equivalent to the world "line," as employed in the act. The people of that day, the Congress of that day, did not suppose that any community needed a road every two or three miles. That was an unheard-of and undreamed-of luxury for the times.

The pioneer farmer, if the could get within 17 miles of a
847 railroad, thought he was fortunate. Without elaborating on the subject, it seems to me perfectly evident that these two routes are upon the same general line. Therefore, without question area A, 347,141.24 acres, must be deducted from the grant. Area B is sought to be deducted because it is said the road between Bayfield and Ashland is a part of the same general line. I do not think so. I think the routes ended their respective termini, and that only the land that was comprehended within the grant to the Portage road to Bayfield should be deducted. It follows, of course, that area C should not be deducted. I have not been able to understand the contention of plaintiff in respect of that area. Therefore, on this point I hold there should be deducted from the grant 347,141.24 acres, thus reducing the area of the grant, and consequently the deficiency, by that number of acres. In order to dispose of all questions arising in this Portage issue, I may add that the bill sought to obtain judgment against the railroad for the value of the lands secured as indemnity for the supposed loss to the Portage road. On argument the plaintiff now concedes that the company may keep these lands, claiming only that it shall assign proper base for its selections. I shall have occasion to determine later on in this report what is proper base, and whether any base is needed. I only call attention to that question now without undertaking to determine it.

II

ERROR IN MONTANA PLACE LIMITS, 5,435.46 ACRES

This figure is the estimated excess area in certain townships in place limits in the state of Montana. In 1925, during the process of adjustment in the General Land Office, it was found
848 that an error had been made by the Commissioner in laying down the northern and southern lateral limits for a considerable distance through Idaho and Montana at the time the road was definitely located. The country not having been then surveyed, the Commissioner determined the limits by protracting or extending existing lines of survey. To correct the convergence of the meridians of longitude because of the earth's curvature, a jog is taken to the east or west at regular intervals of

four townships, or twenty-four miles. By mistake the Commissioner placed the jog in the wrong direction, so that when the survey was made, and superimposed upon the Commissioner's map, the latter was shown to be in error. The result was to throw certain lands formerly considered place lands into the first indemnity limits, first indemnity lands into second indemnity, and second indemnity lands outside the grant. About 145,000 acres were thus shifted from one limit to another. The quantity patented outside the limits was 8,607.71. This is the quantity for which the government originally asked compensation, as for lands erroneously patented, but which, in argument, as stated above, it conceded might be charged to the grant.

The 5,435.46 acres is a different item, but is related in the sense that it is an extension eastward of the same error. The Land Office corrected the limits for a distance, and then estimated the error beyond at 13,312 acres, finally reduced in testimony to 5,435.46.

The item as originally estimated was deducted from the adjustment for the state of Montana, and, in consequence, the adjustment for the entire grant, transmitted by the Secretary of the Interior to the Joint Committee of Congress as a preliminary report March 8, 1925, as is shown at pages 386 and 391 of the report of the Joint Committee hearings.

849 The railway objected to the proof upon the ground that the item was not alleged, but for reasons given above I overrule that objection.

Mr. Schwarm for the company testified that certain townships were over-size, his testimony corresponding closely with that of Mr. Barber for the government; but he claimed, generally, that other townships along the entire line were short of the conventional acreage. The company did not offer evidence of any specific instances, although Govt. exhibits 229 and 230 themselves show that along certain portions of the road the new lateral lines would actually enlarge the place limits. I think it may be regarded as a matter of common knowledge that in the public land states, by reason of convergence of meridians and errors in survey, the north and west tiers of sections making up the township are always, or at least usually, either over, or short of, 640 acres; but as to whether in the aggregate the quantity would be over or short I have no knowledge and do not consider the railway's evidence as sufficient to show it. The testimony and statements of counsel concerning this error are found at the following pages of the transcript: 27, 148–149, 320, 329–339, 601, 733–746, 880–881, 918–919, 1049–1050, 1435–1437.

Neither orally nor in its brief did the government advance any argument concerning this item, though requesting a finding that it be deducted. The company, in its brief, insisted that the original place limits as established by the Land Department ought to control, and requested a finding that the evidence was insufficient to justify a correction.

From the outset the company has freely conceded the Idaho-Montana error, where the lateral limits were actually
850 redrawn. It is testified that the present error is an extension of the former. The company has, in substance, admitted the error and has not offered definite proof to establish any compensating error. While it is difficult to conclude that the quantity of place lands thrown into the first indemnity limits represents the actual area erroneously received by the company, yet no contention was made as to that, and for all that has been said my difficulty may not involve any valid objection. An error being admitted, and the witnesses for the government and the railway being practically in accord as to the excess in the place limits, I feel compelled to find as requested by the government and shall so rule.

III

LIEU SELECTIONS IN INDEMNITY LIMITS, 38,485.23 ACRES

Congress passed several acts, called generally relief acts, for the relief of settlers occuping lands which fell within the limits of railroad grants upon the filing of maps of definite location. As will be recalled, the railroad title, on the filing of the map of definite location, attached as of the date of the grant. If in the meanwhile a settler had entered, the relief acts came to his aid by providing that the railroad, upon relinquishing to him, might select other lands in lieu of those relinquished. The first of these was a general statute of June 22, 1874, 18 Stat. 194, which may be found in the Joint Committee Record (J. C. R.) at page 79. An extension to other situations was made by the act of August 29, 1890, 26 Stat. 369, J. C. R. 82. The act of October 1, 1890, 26 Stat. 647, J. C. R. 85, contrariwise, permitted the settler to leave the railroad land and transfer his rights elsewhere. The
851 act of July 1, 1898, 30 Stat. 620, J. C. R. 89, is the one most often invoked. It provides that where the purchaser, settler or claimant refuses to transfer his entry, "the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished, an equal quantity of public land, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and

free from valid adverse claim or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, * * *," and further, that the Secretary of the Interior ascertain and cause to be prepared and delivered to the railroad grantees lists of tracts which had been purchased or settled upon or occupied. Extensions of that act and certain relief acts of limited application may be found for convenience at J. C. R. 91, 92 and 93.

In exercising such lieu rights the Northern Pacific selected 38,485.23 acres within the indemnity limits, though, as illustrated by the act of July 1, 1898, it might instead have made its selections out of even or odd-numbered sections, surveyed or unsurveyed, within any state or territory into which the grant extended. Some of the selections in question were made before the land was surveyed, and a preponderant part was selected within areas that afterward, when the second indemnity limits in Montana and Idaho were established, fell within those limits. Some selections also were made within areas in Wisconsin and Minnesota that afterward became mineral indemnity limits. Of the entire 38,485.23 acres, only 1,634.23 acres were selected when the land was surveyed and available for selection under the indemnity provisions of the grant.

The United States deducts the area in question from the deficiency in its recapitulation of the statement of the adjustment for the several states, and for the grant as a whole. Thus,
852 Govt. exhibit 103 revised, for the entire grant of 1864, carries it as follows: "Deduction, area within the odd sections of the primary and indemnity limits, selected by the company under lieu acts * * * 38,485.23." As heretofore stated, the company makes no deduction from the deficiency by reason of these selections. The government did not mention this issue either in oral argument or in its brief. In the railway's brief attention is called to the fact that the 1874 relief act, cited above, by its terms, as interpreted by the Land Office, provided that the selections might be made within the limits of the grant and in either even or odd sections, and that the 1898 act and similar acts under which the selections were made contained no specification except, as in the 1898 act, that the selections might be made within any state or territory into which the grant extended, and contends, therefore, that the company had the option of selecting either within or without its limits. It claims also that the grant has been charged with the acreage for which the lieu scrip was issued, and that to charge again for the selection would result in a double charge.

Neither party proposes a finding upon this subject, except only as a finding thereon would be implied in the company's request for ascertainment of the quantity of the deficiency.

The company's claim that a double charge results from the plaintiff's treatment of these selections appears to be well taken. The United States was not injured by the selections, because it was spared the selection of equivalent land elsewhere. The company under lieu acts * * * 38,485.23." As heretofore stated, selections therein, but it is not complaining nor asking for any compensating indemnity elsewhere. I find no reason for the deduction, and rule that none should be made.

853 The rulings which I have made upon the three foregoing points enables me now to state the deficiency under the grant of 1864:

	Acres	Acres
Deficiency as calculated by plaintiff		2,111,479.52
Add:		
Portage, Area B	23,236.81	
Portage, Area C (Tr. 88)	47,022.61	
Selections under relief acts	38,485.23	
		108,744.65
Deficiency		2,220,224.17
The same result is reached by comparison with the deficiency as calculated by the company, or		2,571,765.46
Less:		
Portage, Area A	347,141.24	
Montana place error	5,435.46	
		352,576.70
		2,219,188.76
Add:		
Selected lands charged by company but conceded by it to be mineral		1,035.41
Deficiency		2,220,224.17

The deficiency thus found is represented by unsatisfied losses in the hands of the company, as follows (N. P. exhibit 138 revised; Tr. 944):

	Acres	Acres
Unsatisfied prior losses in entire grant		106,828.08
Unsatisfied subsequent losses in states not having second indemnity limits:		
North Dakota	7,618.00	
Washington	85,659.25	
Oregon	2,851.92	
		96,129.17
Unsatisfied subsequent losses in states having second indemnity limit:		
Wisconsin	6,400.66	
Minnesota	219.92	
Montana	124,982.06	
Idaho	23,922.22	
		155,534.86

	Acres
Unsatisfied mineral losses	2,258,356.88
854 Total unsatisfied losses	2,616,848.99
Less: Portage, Winnebago, and Superior Area A	347,141.24
Net unsatisfied losses	2,269,707.75

Now, this statement of unsatisfied or unidemnified losses is not intended to be exact. It is taken from the company's revised exhibit, supplemented by Mr. Schwarm's testimony, without reconciliation with plaintiff's exhibits, which were prepared before the numerous concessions and other revisions had been made. I think possibly I should deduct from the net total the area of 40,623.16 acres within the indemnity limits patented to St. Paul & Pacific Railroad Company, which after suit (139 U. S. 1) conveyed to the Northern Pacific without the latter's designating base. This would reduce the net unsatisfied losses very nearly to the ascertained deficiency. Yet even if all the figures were brought down to date and reconciled, the unsatisfied losses would never precisely equal the computed deficiency, because in matching losses and selections the area of the loss did not always exactly equal the area of the selection, and because clerical errors inevitable occurred in the administration of the grant. Roughly, the ascertained deficiency corresponds with the losses on hand. The purpose of setting forth the unsatisfied losses is to show that they are of several kinds, and that the greater part is mineral.

IV

LANDS SELECTABLE FOR MINERAL LOSSES: MEANING OF "AGRICULTERAL LANDS"

The deficiency in the grant having been ascertained, the problem is, where and how may the railroad make it up? The United States contends that even if the national forests
855 and other government withdrawals are open to the invasion of the company for this purpose, it is quite impossible to satisfy any considerable portion of the deficiency, because the lands sought to be taken are of such character that, under the terms of the act, they cannot be selected for the particular losses that the company has on hand. Thereupon various questions arise, around which the controversy wages, for the purposes of determining whether this contention of the government is correct or whether, on the other hand, the railway may take these lands in satisfaction, in whole or in part, of this deficiency.

What is the interpretation to be placed upon the phrase "agricultural lands" in the third proviso to Section 3 in respect of the selection of indemnity for mineral losses? The language is:

"Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and, in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, and within fifty miles thereof, may be selected as above provided."

The lands to which this interpretation is to be applied are principally that vast tangle of mountains and forests, and rivers and valleys, contained in the national forests of the United States, beginning with the Custer on the east, and extending in almost unbroken connection to the group of forest reservations along the Cascade range. In general, the lands may be identified as the hatched portions of the national forests shown upon Northern Pacific exhibit 88.

The United States appeals to the ancient and fundamental rule of statutory construction that words are to be taken in their literal meaning or according to their common usage, as the
856 subject and the context and the surrounding circumstances may require, but that where both the dictionary sense of the term and common usage are identical, there is no room for interpretation, and the language used must be deemed used in that precise sense and no other.

On the other hand, the company maintains that the expression is one of classification, not of definition; that the term "agricultural" is used in distinction to the term "mineral," and was intended to denote all lands not mineral in character within the meaning of Section 3. The question thus raised is of controlling importance because if the government's contention be sustained, there is no place that the company may go to satisfy the bulk of its deficiency, and it will be quite useless, until this question is determined, to discuss the other questions that arise.

Preliminarily to an analysis of that language and of the authorities cited one way and the other concerning it, I shall consider specific cases comprehended on the one hand by the term "mineral," and on the other by the term "agricultural."

The expression "mineral lands" has been given a very broad interpretation as including not only metalliferous lands, but, as well, lands valuable for deposits not metalliferous, including marble, slate, building stone, clays, petroleum, asphaltum, phosphate, and such an exceptional instance as guano. For a comprehensive, sweeping, determination of what is mineral, one should read

the opinion of Mr. Justice Brown, with its wealth of illustration, and its citation of authorities going back to the early English cases, in Northern Pacific Railway Company v. Soderberg, 188 U. S. 526, in which it was held that a portion of a
857 certain odd-numbered section within the place limits of the grant of 1864 in the state of Washington, valuable solely or chiefly for granite quarries, was mineral.

Similarly, the term "agricultural" has been given equally broad signification. Thus, under the homestead law, in applying the requirement of "cultivation," which etymologically has the same origin, in part, as "agricultural," the Land Office has permitted entries, upon plow lands, grazing lands, lands chiefly valuable for timber but which, upon removal of the timber, are tillable, and quite liberally all lands which the settler might wish in good faith to occupy as a home, however, erroneous his judgment might be as to the fitness of the lands for cultivation. The usual instance in which his application has been questioned is where the value of the land for timber was such as to have raised a question of his good faith.

Notwithstanding the wide interpretation given to the two terms, you come at last to a sort of no man's land, neither mineral nor agricultural under any possible definition of those expressions. In this case the no man's land comprises much of the lands in N. P. exhibits 144 and 146, by which the company seeks to lay mineral losses directly upon first indemnity and mineral indemnity lands within forest and other reserves. It may also comprise a substantial part of the lands described in N. P. exhibit 145, by which the company seeks to lay mineral losses upon first indemnity lands not embraced in reserves, in substitution for subsequent losses used long ago in the selection of such lands, in order to release those losses so that they may be used to take up second indemnity lands within reserves which by reason of
858 being more than fifty miles from the road, are not selectable directly for mineral losses; for the government in its argument upon the subject of substitution or rearrangement of base makes the same objection to these substitutions that it makes to selections under N. P. exhibits 144 and 146, viz: that the company has failed to sustain the burden of proving that the lands sought to be supported by mineral base are agricultural.

The selections under N. P. exhibits 144 and 146 in first indemnity and mineral indemnity aggregate 1,340,000 acres, of which about 10,800 acres, or less than one per cent, are classified agricultural by the government in its testimony and its exhibits 237, 244 and 248:

MINERAL SELECTIONS IN FIRST AND MINERAL INDEMNITY LIMITS WITHIN NATIONAL FOREST BOUNDARIES

Forest	Acres, agricultural	Acres, non-agricultural
Kaniksu	Nil	54,027.39
Pend Oreille	40.00	1,379.05
St. Joe	Nil	52,044.12
Clearwater	2,720.00	115,876.45
Selway	224.00	80,880.29
Kootenai	1,161.00	36,347.80
Blackfeet	Nil	12,646.45
Flathead	4,265.00	190,326.04
Lolo	Nil	25,527.23
Lewis & Clark	Nil	41,080.00
Helena	Nil	9,180.00
Deerlodge	361.00	37,913.12
Jefferson	454.20	86,390.35
Beartooth	80.00	127,970.95
Absaroka	129.30	198,217.50
Gallatin	Nil	39,684.00
Madison	Nil	7,670.51
Bitter Root	Nil	31,863.36
Shoshone	240.00	47,807.99
Snoqualmie	[1] Nil	57,200.00
Wenatchee	[1] 1,128.67	53,400.00
Rainier	Nil	25,600.00
Totals	10,803.17	1,353,032.72

[1] Approx.

859 The aggregate of the proposed substitutions is approximately 664,000 acres additional, with respect to which the government insists that the company has failed to offer any proof of agricultural character. The issue, therefore, involves in all about 2,000,000 acres.

Counsel for the governme have appealed to the dictionary sense of the word "agricultu " and have gathered together the dictionary definitions beginning with Dr. Johnson in 1755, down to and including that vast repository of word knowledge, the Oxford Dictionary. Thus, Dr. Johnson: "the art of cultivating the ground; tillage; husbandry," the Oxford: "The essence and art of cultivating the soil; including the allied pursuits of gathering in the crops and rearing livestock; tillage; husbandry; farming, (in the widest sense)" and the Century: "the cultivation of the ground, especially cultivation with a plow and in large areas in order to raise food for man and beast; husbandry; tillage; farming," and it is argued that agricultural lands mean lands that may be subject to the pursuit of agriculture in the sense of these definitions. I do not think it is at all possible to adopt this dictionary sense. It would be quite contrary to known conditions existing in the territories in which the grant to the railroad was to be located. Whatever the word "agricultural" means it certainly means much more than this.

So, likewise, the cases cited in support of their construction of the phrase "agricultural lands" cannot throw much, if any, light

upon the subject. Those cases all arise under the timber and stone act, the homestead law, or other specific legislation in which it becomes necessary to compare the value of the land for tillage and its value for some other statutory purpose.

860 In further application of their contention counsel put in evidence the testimony of the foresters who had classified the lands in these various reserves under another statute, and for a different purpose than any involved here. The classification was into agricultural and nonagricultural lands. Their testimony is intelligent; their classification was apparently made with care and accuracy. They introduced airplane pictures taken over these national forests, and when one has become accustomed to the perspective, they show a condition familiar to Your Honor and to me. One sees from those pictures the small areas of valley land, strictly agricultural according to the definition. The foresters admit only some 10,000 acres in all this vast area to be of this type. One sees the conifers in solid growth, their trunks almost touching one another in the valleys, extending up the mountain side, the species changing as they reach the higher levels in the age-old struggle of their forbears to reduce the rock of the mountains to the soil of the valleys. One observes the mountain tops of solid granite, or, in some of the lower levels, of volcanic rock. In these regions, as shown by the photographs and as known to men familiar with them, there is nothing to suggest the conception of "agricultural lands" or of "agricultural" as defined by the dictionaries, or as commonly understood; nothing to suggest the idea of the springtime and the harvest, of the plowing and the sowing and the reaping; nothing to suggest the fixed habitation of man with his homes and his outbuildings, his fences and cultivated fields. Rather one's mind goes to the nomadic tribes, like the Jews of Abraham's time, living in tents and following their flocks into the hills and along the river valleys for grass and water. One thinks, too, of the cedars

861 of Lebanon and of the mighty forests of redwood which once covered the Pacific slope from California to the Bering Sea.

Counsel cite various speeches in the Congress that was considering the act, particularly referring to the description by Governor Stevens of these lands and his insistence upon the area of tillable lands, and to the account that Captain Mullan gave. They cite, too, certain language from various decisions of the courts. From it all they conclude that, with the exception of a few scattered tracts, the term "agricultural lands" cannot be applied to the lands in these reservations, and that they, therefore, cannot be selected for mineral losses.

I am not greatly impressed with the argument founded on what was said by various members of Congress touching the agricultural lands to be found along the line of the road west of the Missouri River. Doubtless they were appealing, with the strongest arguments they could think of, to Congressmen from the northeast and middle west, to vote for the bill. Even if their fervor of expression was justified, it does not necessarily follow that what they said applies to the unselected lands now lying in the indemnity limits of the grant. I have already expressed the opinion that the dictionary sense of the words "agricultural lands" is not sufficiently broad to cover the intent of this phrase. About that matter I have no sort of doubt, but if we extend that phrase to cover, under certain circumstances, pasture land, and, under other circumstances, timber lands susceptible of cultivation after the timber is removed; in short, if we give it its widest possible significance according to the dictionaries and the decisions of the courts and the Land Office, I still think it does
862 not come up to the purposes of Congress. I think it is too narrow; I think it excludes too much. My views upon the whole question will be more fully stated presently.

Mr. Frost refers to two other land grants containing the identical proviso we are considering. It does most certainly appear that the phraseology had become established so that it was used without any question as late as 1871. No controversy had arisen over it, and Congress and the Land Office, as well as other railroads applying for grants of land, seemed content with the phrase as it stood. From the beginning of the administration of this grant it was consistently the understanding of Land Commissioners and Secretaries of the Interior that the phrase was one of classification and was intended to mean, and it was held did mean, all lands not mineral in character. In sense, therefore, I may remark in passing, when subsequent statutes used the same phrase they took it as construed by the Department. Now it is quite true that, by the terms of the act under which this suit is brought, this court is required to correct all errors of construction and administration, whether of law or of fact, committed by the Land Department of the government, but that does not mean that there shall be no persuasive force, no effect whatever, given to the rulings of that department. It means only that where they are manifestly wrong, the court shall so adjust the grant as to correct such errors.

It must be continually borne in mind that, when this grant went into effect, the United States was engaged in a terrific conflict to preserve its own existence. It must be remembered that, when the resolution of 1870 was adopted, the war had been over

but five years. Now, out of that struggle came wounded and disabled soldiers, thousands upon thousands of them. Other
863 thousands upon thousands had left their homes and occupations, many of them as young men, and had come back with no place to go nor any occupation to follow. In great part it was the intention of these grants to the Northern Pacific to open up a country where these returning soldiers might find homes, and make settlement, and build up new commonwealths to be added to the Union. The whole spirit of the act breathes that purpose, just as plainly as it does the policy towards mineral lands, thus stated by Mr. Justice Field in Barden v. Northern Pacific Railroad Company, 154 U. S. 288, 318:

"The tract granted covered a belt believed to be rich in minerals of gold and silver, and the United States were at the time engaged in a terrific conflict for the preservation of the Union, incurring an immense debt, exceeding two thousand millions, and many of their citizens, engaged in the struggle, looked forward hopefully and confidently to this source for relief to the burdened treasury. And we cannot with reason suppose that, under these circumstances, the United States intended that the control of this source of wealth and relief should be taken from them. It passes belief that they could have deliberately designed in this hour of sore distress and fearful pressure upon their finances to give away to a corporation of their own creation not only an imperial domain in land but the boundless wealth that might lay buried in the mineral regions covered by 80,000 square miles."

This language is not at all weakened by the fact that the forces of private greed and gain so altered the policy of the government that its mineral resources were thrown upon to public exploitation.

It might be remarked in passing, too, that this language is consistent with the settled practice of the Department and government officials in putting agricultural lands and mineral lands in opposition to each other.

I see no reason why one policy should apply to the place limits and another to the indemnity limits. All lands within
864 the place limits passed by the grant, except mineral. Why should a different policy be thought to apply with respect to the indemnity limits, except that the coal and iron exclusion is compelled by the use of the word "agricultural" as opposed to "mineral"?

It is certain that the Interior Department was administered, at the time of this grant and for many years thereafter, by men who had lived through the trying years of the Civil War, many of whom had taken part in it, Secretaries, Commissioners of the General Land Office, and heads of bureaus in the Department. I think it ought to be assumed that these men were more familiar

with the intention of Congress than we are today. I think great effect should be given to the contruction which they placed upon this phrase, and to the manner in which it was consistently and continuously, down to the passage of the act under which this suit was brought, administered by them. Of course, we may observe in the opinions of Commissioners and Secretaries, in individual cases, a tendency in after years to tighten up on this construction, to limit it as far as possible. Times had changed, views had altered, other questions had obtruded themselves upon the construction of this grant. Hostility against railroad grants and railroad usurpations had been gathering, and it is only to be expected that, to a certain extent, this sentiment should be reflected. I cannot believe that the men who administered this grant through the early years could have been mistaken as to the intent of Congress.

Much argument is made by the government to the effect that the Department had under its control and administration all the public lands of the United States, running into millions and millions of acres, that they had not the time to give careful
865 attention to each subject, that they took the grant as meaning what the company said it meant, and, so to speak, let it go at that. I cannot thing that this is a just explanation of the opinion entertained by the officials of the Land Department. It is apparent that for many years—I will not stop to run back and see for how many—the administration of railroad grants was committed to a special division of the General Land Office. It had heads and it had counsel. They gave careful attention, as the reports of the Department show, to each detail and to each step of that administration. I am persuaded that the interpretation placed upon this phrase was intentional and upon deliberation.

There were no timber and stone acts, no desert land acts, no acts of Congress throwing open to settlement and exploration under any particular regulations the mineral lands of the United States. There were no forest reserves nor game preserves, no thought or idea of maintaining watersheds. All the various complications in the administration of the public lands of the United States were introduced long after this act, and in view of considerations that obviously had never occurred to the executive or legislative branches of the government. To undertake to construe this part of the act in the light of all this subsequent legislation, of all the subsequent proclamations creating forest and other reserves, is futile.

The argument is made that the construction of the phrase "agricultural lands," if used in opposition to mineral lands, would mean only "other lands," and that mineral indemnity losses might

as well, therefore, have been put in the same clause, and in the same connection, as the indemnity provision for general losses.

866 By the general indemnity clause in Section 6, it is enacted that whenever prior to the definite location of the road any of the sections, or parts of sections, shall have been "granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of," other lands should be selected by the company in lieu thereof, and the argument runs that there was no necessity for a separate proviso for mineral losses. This, to my mind, taken at its face value, and as stated, is a powerful argument and difficult to answer; but even taken at its face value and with all the force that is conveyed by the manner of its presentation, I still think that it is not sufficient to overcome other considerations. An analysis of Section 3 will disclose that the argument is specious rather than sound. By the general indemnity provision quoted above, it would result that the company might select any lands, mineral as well as nonmineral, for those losses because the unqualified phrase is "other lands" not more than ten miles beyond the limits. Now, by construction it has always been said, and it must be held, of course, that the words "other lands" do not include mineral lands, except coal and iron, because by the terms of Section 3 mineral lands are excluded from the operations of the act. Coal and iron lands would thus have been excluded were it not for the addition that mineral should not be held to include iron or coal. If, therefore, the phrase "agricultural lands" were equivalent to the phrase "other lands," it would follow that for mineral losses the company might select any other lands, including coal and iron, and that only minerals other than coal and iron would be excluded from selection.

867 For some reason, however, Congress did not intend this result, and by the use of the term "unoccupied and unappropriated agricultural lands," within prescribed limits, it meant to exclude from the selection for mineral losses all mineral lands, including coal and iron. To put the whole provision in plain and direct language, the effect of the statute, if agricultural lands be construed as used in opposition to mineral lands, is this: for the general losses in place, the company might select any other free lands in the indemnity limits, including coal and iron, but not other mineral lands; and for mineral losses it might select within the limits any other free lands nonmineral in character. Thus the only difference between the indemnity provisions for general losses and for mineral losses is the coal and iron lands. The only difference in location is the difference expressed in the words "within fifty miles thereof" for mineral

losses, and "not more than ten miles beyond the limits" for general losses. The same idea might have been expressed, instead of the short phrase "agricultural lands," by a circumlocution, as, for instance, "other lands not mineral in character, and not coal and not iron," thus making sure of the difference between the selection for mineral losses and for general losses. Construing the phrase "agricultural lands" as I have construed it makes it mean precisely that, nothing more and nothing less.

As I read the opinion of Secretary Ballinger in Northern Pacific Railway Company, 39 L. D. 314, he held to the same construction, so far as it was necessary for him to consider it in that case. The question before him was whether admittedly coal lands could be taken as indemnity for mineral losses. Conceding that for general losses they might be so taken, he ruled that for mineral losses they could not be selected because they were not agricultural lands. This was as far in the analysis of the term "agricultural lands" as it was necessary for him to go,
868 and nothing more is to be made out of the opinion than just that.

Concededly, the term "agricultural lands" may be read in the sense the government attaches to it; but obviously within familiar rules of construction it may be read as a term of classification. The whole things turns on what Congress intended in the use of the phrase. There are certain fundamental rules of construction, reference to which may be useful here. Sir William Blackstone thus states the rules I have in mind (Bl. Comm., Introd. Sec. 2):

"The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all:

"'1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf which forbad a layman to lay hands on a priest; was adjudged to extend to him, who had hurt a priest with a weapon. Again, terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited "to the princess Sophia, and the heirs of her body, being protestants," it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words "heirs of her body," which, in a legal sense, comprise only certain of her lineal descendants.

"'2. If words happen to be still dubious, we may establish their meaning from the context with which it may be of singular use to compare a word or a sentence, whenever they are ambiguous, equivocal or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is; and when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.

869 "'3. As to the subject matter, words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III forbids all ecclesiastical persons to purchase provisions at Rome, it might seem to prohibit the buying of grain and other victual; but, when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the pope were called provisions, we shall see that the restraint is intended to be laid upon such provisions only.

"'4. As to the effects and consequence, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore, the Bolognian law, mentioned by Puffendorf, which enacted "that whoever drew blood in the streets should be punished with the utmost severity," was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit.

"'5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought to likewise cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius. There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and

claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither stayed in the ship upon that account, nor contributed any thing to its preservation,'"

I think the phrase "mineral lands" as used in this statute is a technical term as defined by Blackstone; certainly it is as construed by the courts in the opinions and instances to which I have previously referred. Certainly in a popular sense guano, asphaltum, granite and lime stone are not minerals. In the ordinary use of the word "mineral," the widest possible
870 significance includes only the precious minerals, or, at most, all metalliferous substances. Possibly it might be conceded that coal and iron would be popularly included, but I think that beyond that the phrase "mineral lands" has to be construed within the principle stated by Blackstone in the foregoing quotation. Of course, the words "agricultural lands" in their popular sense include all sorts of land that are capable of tillage, or that are capable of being reduced to tillage although in their native state they are untillable. Nobody doubts, I should suppose, that the vast areas of the original hardwood forests of Ohio, Indiana, and Kentucky, were agricultural lands in the popular sense, whether in a dictionary sense or not. I suppose that nobody ever thought that the stony and rocky hills of Vermont and New Hampshire were not, at the time of settlement, or are not now, agricultural land. In popular speech we speak of excellent agricultural land, of poor agricultural land, and sometimes of fair agricultural land. Like almost every other thing in nature, it has its degrees. Perfect agricultural land is seldom found. It ranges all the way from the very poorest and most stubborn, yielding scarcely an existence to the cultivator, to the rich farming land of the Mississippi Valley, where the slightest effort of the husbandman is returned many fold.

I am particularly impressed by the rule indicated by Blackstone, that an interpretation leading to an absurdity should be avoided. It is a strange thing in the history of law, as in the history of other human institutions, how often, after the lapse of centuries, the same questions repeat themselves and the same doctrines must be reapplied. No possible enlargement upon the subject of the principles just quoted from Blackstone
871 could equal the review of the whole subject by Mr. Justice Brewer in Church of the Holy Trinity v. United States, 143 U. S. 457, where, after pointing out that the transaction was

strictly within the terms of the statute, as ruled by the court below, it was held that a contract by Trinity Church in New York City with an alien residing in England, for the latter to enter into the service of the church as rector and pastor, was not within the meaning of the statute making it unlawful—

"for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia."

There will be found practically every case that is accustomed to be used in illustration of this subject. When I first came to the consideration of this question months ago, I thought I must give some meaning to the word "agricultural" that brought it within its literal or popular understanding; that whether it was used as a word of classification or not, it was yet, if not strictly used as a word of definition, intended to restrain and to limit the kinds of lands that might be taken. Upon reflection, however, and after much thought and consideration of the arguments and of all the illustrative cases put to me by counsel, I have come to the confirmed opinion that within the doctrines of construction there stated it must be deemed purely a term of classification. Briefly put, why should Congress restrain the railroad from making up its mineral losses in the barren and unproductive mountain regions where they occurred, and
872 require it to go into the rich farming lands of Wisconsin, Minnesota, Dakota and central Washington. What purpose *of* object could be subserved by that, except to deplete the valuable lands that would otherwise be left open to settlers and to preserve what to that Congress were lands utterly valueless. I think such a construction leads to an absurdity. To borrow a suggestion from Mr. Justice Brewer in the Trinity Church case, I think that if the question had been put up to Congress, if somebody had proposed an amendment to the act saying that no worthless land should take the place of these mineral losses, that no barren mountain tops should be taken instead of them, but that the railroad should be confined in the selection of lands in lieu of mineral losses to strictly agricultural farming lands, he would have found not one voice or vote in support of the motion. I think it too clear for argument that any Senator or Congressman to whom the proposition might have been put

in that July of 1864, that the phrase forbid the railroad to take worthless land and required it to accept only what, to the mind of the Congressmen of that day meant the most valuable lands, would have repudiated it and hastened to offer an amendment to make it clear. The whole thing seems to me grotesque in its conception. I can but wonder if counsel can seriously consider that if, in 1876, and in 1880, and even in 1890, the railroad had proposed to take this sort of lands, the government would have said, "No, we want to keep the barren mountain tops, rocky hillsides and stunted forest growths; you may not choose them, for the statute forbids; you must go to Wisconsin, Minnesota, North Dakota and central Washington, and hunt out unoccupied rich farming lands, and from these lands satisfy those losses." And now I am asked to rule that what it is certain no Senator or Representative would have voted for, is what they all
873 meant by the phrase. Of course it is equally absurd to suppose that the company would have proposed any such thing.

It was known to that Congress, as it is known to us, that with the possible exception of coal and iron the mineral lands would be found west of the Missouri River. It was in that portion of the road that the mineral loss would occur. It was known that the same character of land, the same topography, as existed in the place limits, existed in the indemnity limits opposite them. There was no difference in these respects between place and indemnity lands. Now to my mind it is utterly preposterous to assume that Congress seriously intended that the losses must be lifted out of their natural surroundings and carried eastward to the vast agricultural stretches then, as now, known to lay along the line of the road. Can anyone suggest any plausible, or even any possible, reason for such an intention?

I have already called attention to the purpose of the act to open up the country so that the returning soldiers might go there to find homes. Now I am asked to assume, because of the literal phrase, that, in the teeth of that purpose Congress intended to deplete the lands which could serve that purpose and to keep lands where by no possibility could these men seek habitation. The whole thing so offends my every notion of statutory construction, so offends every possible historical purpose, that I cannot for one moment entertain the thought.

Shenk v. Aumiller, in the Western District of Washington, by Judge Neterer (1914) 217 Fed. 969, is an illustration of the interpretation of a statute as using the words "agricultural" and "mineral" in opposition. An act of August 30, 1890, limited the aggregate of entries by any one person upon the public

874 lands to 320 acres. The following year Congress, in effect, added a proviso that the act should be construed as pertaining only to agricultural lands, and not to mineral lands. Shenk had therefofore acquired 320 acres under the desert land law, and sought to file on additional land. The court held that the words "agricultural lands" were used only in contradistinction to mineral lands.

As pointed out by the company, the 5,120 acres involved in the Forest Reserve case were selections in what is now the Gallatin National Forest, on mineral losses. The government's testimony shows that not one acre of the Gallatin National Forest is agricultural within its definition. Hence, though the selections in the Forest Reserve case involved the identical question now presented, it was not raised. Nevertheless, Mr. Justice Van Devanter, in writing the opinion, made a statement which, in the light of the present contention of the government, is startling. In stating the terms of the grant he said (256 U. S. 51, 59):

"As indemnity for any lands so excepted, as also for any excluded as mineral, other lands were to be 'selected by said company,' under the direction of the Secretary of the Interior, from unoccupied, unappropriated, nonmineral lands in odd-numbered sections within prescribed indemnity limits."

Thus he interpreted the word agricultural, in the very proviso under consideration, and in an identical situation, as meaning nonmineral.

The United States introduces its discussion of the subject with these words:

"This issue is squarely presented for the first time in this court."

To my mind that itself is almost a conclusive answer to the argument. Without attaching undue importance to the language of Mr. Justice Van Devanter, and treating this issue as
875 one of first impression, yet the question was inherent in every mineral selection made by the Northern Pacific from the inception of these grants down to the present time, as well as in every mineral selection under at least two other grants having identical mineral indemnity provisions, that of July 27, 1866, to the Atlantic & Pacific and the Southern Pacific, and that of March 3, 1871, to the Texas & Pacific. After nearly three-quarters of a century this question is now raised for the first time.

If, in the Forest Reserve case, the Attorney General's office, the Land Office, the railway company, or the Court, had considered that the lands then sought to be selected could not be taken on mineral base because nonagricultural, there would have been

no necessity to go to any other question. Now I am asked to rule that I should go back of the uniform ruling of the Land Office, back of the Forest Reserve case, and hold that the railway company through guile concealed this question, and that through indolence and overwork, all departments of the government failed to apprehend it.

In what I have said above I have had in mind the several rules of construction stated by Blackstone, but have not attempted to separately apply them. They run in this case, as in most others, into one another. Thus the spirit, purpose, results, the condition of the country, the situation of our people which called for the railroad and the grants, all point to one meaning of the phrase and make absurd to my mind the literal meaning tendered by counsel through dictionary definitions.

I conclude that the mineral indemnity selections listed in N. P. exhibits 144 and 146 may be made in any lands which are nonmineral, noncoal, and noniron. I believe that the testi-
876 mony is undisputed that the lands in the first and mineral indemnity limits to which these selections are directed are of that character. I am, of course, not attempting now to determine whether they are available for selection as against other objections, presently to be discussed. I further conclude that the substitution selections upon mineral losses proposed by N. P. exhibit 145 are not to be defeated by want of proof that the lands sought to be supported are agricultural in the literal sense. They were ascertained to be nonmineral, when the original selections were made, and that is sufficient. The question as to their noncoal and noniron character will be considered in the discussion of the substitution issue.

V

LANDS IN ABSAROKA AND BEARTOOTH FORESTS. 314,544.05 ACRES

These land lie within the place limits in Montana. They were lost to the grant by reason of the existence of the Crow Indian Reservation, the reservation having been created by treaty of May 7, 1868, and the road not having been definitely located through it until June 27, 1881. Indemnity was had for the loss. Afterward, April 11, 1882, Congress ratified an agreement with the individuals and heads of families of the Crow tribe whereby the Indians agreed to sell certain reservation lands, including those in dispute, to the Government of the United States, it agreeing, in consideration thereof, to pay to the Indians $30,000.00 per year for 25 years in addition to the expense of survey of the remaining lands and certain other sums. While the rule announced by Attorney General Wickersham in 1912, found in 41 L. D. 571

(see also pp. 574–583) evidently would have authorized the company to select such of the restored lands as were surveyed,
877 in satisfaction of mineral losses, it did not attempt to do so, and the United States, by successive withdrawals in the years 1902 to 1909 inclusive, put the lands in controversy partly in the Absaroka, and partly in the Beartooth, national forests.

The Attorney General, at the citation just given, advised the Secretary of the Interior that place lands lost to the grant and afterward restored to the public domain were subject to selection for mineral losses, as being, at the time of selection, unoccupied and unappropriated lands within fifty miles of the road, and the Department thereafter administered the grant in accordance with that advice. The government does not appear to contend that the opinion and practice are erroneous. It implies that if the company had got about to select the lands before Congress reappropriated them for the national forests, it could have obtained them as indemnity. The government calls attention to adjoining Crow lands which were restored for disposal to actual settlers only and to which the company abandoned its claims, the point of the distinction being that since the government could restore upon such condition that the company could not select, the company could not complain if a gratuitous unconditional restoration were thereafter revoked.

The company relies upon the opinion of the Attorney General. It excuses its omission to select the lands by explaining that the withdrawals occurred before the opinion and the consequent practice permitting mineral indemnity selections in place limits. It also says, which I accept as a fact, that the government has patented to the railway as mineral indemnity 60,000 acres of restored Crow lands, which were not put into reserves. Incidentally the railway has selections pending for 4,390.47 acres of lands in similar situation.

878 The government has made no question about restored Crow lands and other restorations to the place limits patented to the company. It has not asked for reconveyance nor compensation. I assume that any such patented lands would in any case fall within the rule applied to other lands erroneously patented, and should be charged to the company, the grant being deficient and no lands being tendered in their stead. That rule was conceded as to the lateral and terminal errors and the Greater Sioux lands. The government does not seem to be contending that the company is not entitled to patents upon its pending selections.

The whole question will turn upon what the phrase "and within fifty miles thereof" means. Does it include the forty-mile place limits of the grant, or does it mean only the ten-mile indem-

nity strip created for other losses so that for mineral losses the company could go to the same strip to which it went for other losses, and not elsewhere? The first thing that strikes one when he comes to consider this question is: What lands within the forty-mile limits could have been taken? By the very terms of the statute they had to be unoccupied, unappropriated, odd-numbered sections; but those very lands passed by the grant, and, therefore there was nothing left, apparently, from which a selection could be made to satisfy mineral losses. If these words are held to apply to the forty-mile place limits, then it follows of necessity that Congress intended that lands which, for one reason or another, were restored to place limits might be selected in satisfaction of mineral losses. Congress doubtless appreciated that it might be many years before mineral losses in place would be known, and that, in the course of those years, many restorations to the place limits would be made—homesteads which
879 had been abandoned, or which for some legal reason the settler had failed to get under his claim; lands reserved and held by the government for some purpose, and restored to the public domain when the purpose had been accomplished; in short, all sorts of restorations to place limits.

I say frankly I should have been inclined to hold that this construction of the provision was rather fanciful, and I should not have been inclined to adopt it, except for the opinion of Mr. Wickersham. I should not be willing to set up my own judgment in opposition to the opinion of so great a lawyer. However, that this construction must be adopted is plain from a consideration of the grant to the Southern Pacific of date July 27, 1866, precisely two years after this grant was made. There the act contains, ipsissimis verbis, the mineral indemnity provision of the Northern Pacific grant, except that in that case it was confined to the place limits, that is, twenty miles on each side of the line of the road. Now, obviously, therefore, Congress intended in 1866, by that language, that indemnity might be selected from restored lands, because there were no other lands out of which possibly any selections could have been made. If, therefore, that was the Congressional intention, as it plainly was under the Act of July 27, 1866, there is no difficulty in understanding that the same precise provisions extending ten miles beyond the place limits should receive the same interpretation. I can see no possible answer to this. Of course, when the government reacquired these lands from the Crow Indians, it might have limited them to a special purpose, and held them only for that purpose, in which event I should think they would not fall within the above reasoning; but, as a matter of fact, the lands were restored to the public domain without limitation. They then became

a part of the indemnity limits for mineral losses and
880 subject to selection therefor. I think, too, that the opinion of Mr. Justice Holmes, speaking for the Supreme Court in the case of United States v. Southern Pacific Railroad Company, 223 U. S. 565, declares precisely the foregoing principles. There the lands in dispute were within the indemnity limits of the grant to the Southern Pacific, and within the place limits of the grant to the Atlantic & Pacific by the the same act. The Atlantic & Pacific grant was forfeited. Patents were issued to the Southern Pacific on indemnity selections and the United States brought suit to cancel them and for an accounting, arguing that since the lands lay within the place limits of the Atlantic & Pacific they could not have been contemplated as possibly falling into the indemnity limits of the other road. The Circuit Court and the Circuit Court of Appeals held that the state of the lands at the time of selection determined the right. The Supreme Court affirmed, saying (p. 570):

"An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power. Ordinarily no color of title is gained until the power is exercised. When it is exercised in satisfaction of a meritorious claim which the government created upon valuable consideration, and which it must be taken to have intended to satisfy (so far as it may be satisfied within the territorial limits laid down), it seems to us that lands within those limits should not be excluded simply because in a different event they would have been subject to a paramount claim. It seems to us, in short, that Ryan v. Central Pacific Railroad Company, supra, should be taken to establish a general principle and should not be limited to its special facts."

Ryan v. Central Pacific Railroad Company, 99 U. S. 382, had applied the same doctrine to indemnity lands which at the time
of the grant were subject to a claim under a Mexican
881 grant. It was held that upon the later extinguishment of that claim, the lands were subject to selection as indemnity for losses in the primary limits of the railroad grant.

Thence it follows that the Absaroka and Beartooth lands became subject to selection when they ceased to be a part of the Crow Indian Reservation, and are as much within the rule of the Forest Reserve case as any other indemnity lands.

VI

LANDS FORMERLY IN FORT ELLIS MILITARY RESERVATION, 3,300.82 ACRES

Fort Ellis was created prior to definite location of the railroad. It lay within the place limits, so that the lands were lost to the grant; and indemnity was had for them. The fort was abandoned in 1886 under the Act of July 5, 1884, 23 Stat. 103, entitled "An act to provide for the disposal of abandoned and useless military reservations," providing for the survey, sale and appraisement of the lands within any military reservation which might become useless for military purposes. Later, by Act of February 13, 1891, 26 Stat. 747, entitled "An act to provide for the disposal of the abandoned Fort Ellis military reservation in Montana, under the homestead law, and for other purposes," Congress granted one section to the State of Montana for a militia campground and authorized the State to make certain other selections, and further provided:

"That if any portion of said reservation shall remain unselected by said State for a period of one year after the approval of the survey, that portion remaining unselected shall be subject to entry under the general land and mining laws of the United States."

It is obvious that these restored lands will be governed by the principle applied to the Absaroka and Beartooth lands, unless taken out of that principle by the proviso just quoted.

882 The government contends that lands which Congress has made "subject to entry under the general land and mining laws" may not be selected under the Northern Pacific granting act, it being a special statute.

The company emphasizes that under the mineral proviso indemnity may be taken from unoccupied and unappropriated odd-numbered sections within fifty miles of the line of the road. It contends that at the date of withdrawal the lands were unoccupied and unappropriated, and interprets the Act of February 13, 1891, as meaning that the lands should be subject to disposal under the laws relating to both nonmineral and mineral land. It states that 80 acres were selected by the company under one of the lieu acts and that 160 acres classified as mineral were selected and patented to the company under the same act. It states that the Secretary caused these lands to be classified under the mineral classification act, and that in general the Secretary treated the land as part of the unrestricted public domain.

The statute under which the Fort Ellis Reservation was abandoned was evidently not a restoration to such status that the

lands might have been selected. It permitted only survey, appraisement, and sale. The later statute authorized only "entry" under the general land and mining laws. While the Northern Pacific granting act was a public land law, as well as a contract relating to the public lands, it was not a general land law, but a special one. "Entry" is a technical word relating to the procedure whereby persons may initiate rights to lands within the public domain. It does not comprehend the other technical term "selection." Having regard to the fundamental rule that the grant must be strictly construed in favor of the sovereign,
883 I must hold, notwithstanding such practice as the Land Office may have followed with respect to them, that the Fort Ellis lands are not subject to selection.

VII

LANDS IN NORTHERN CHEYENNE INDIAN RESERVATION, 52,052.93 ACRES

Unlike the lands under the last two headings, these are not lands restored to place limits. They lie in first and second indemnity limits. After definite location of the road they were placed, by executive orders, in the Indian Reservation. The action of the government in thus undertaking to deplete the indemnity limits raises the same question as that pertaining to withdrawals for national forests and other governmental purposes, and will be discussed as part of the general discussion of that subject, unless removed from it by the special points now made by the government.

Until 1926 all of the lands within the reservation including those lying within the company's indemnity limits were kept in tribal status. In that year Congress declared the reservation to be the property of the Indians, and authorized the Secretary of the Interior to prepare a roll of the Northern Cheyenne Indians then living and to allot in severalty lands classified as agricultural and grazing to the enrolled Indians in tracts not exceeding 160 acres. 1,547 allotments were made in 1932.

The government contends that no compensation should be awarded to the company for these lands, because, first, an Indian reservation is not a "Government reservation" within the meaning of the act of June 25, 1929, under which this suit is brought, providing that indemnity lands within the boundaries of any national forest or other government reservations are taken out of the operation of the grant and retained by the United
884 States, and that the company have compensation therefor;

and, second, there is no evidence that the lands are unappropriated and unoccupied. The company, on the other hand, maintains, first, that the Indian tribes are wards of the government; that an Indian Reservation is a public use; that the government retains the power of disposal; and that such a withdrawal is within the meaning of the 1929 statute; and, second, that the lands were unoccupied and unappropriated at the time they were withdrawn and set apart for reservation purposes.

I am not inclined to give the term "Government reservation" in the 1929 act, a limited meaning. As I have heretofore said, it is the evident purpose of that act to determine all controversies and have a full accounting. It would be very unfortunate if by reason of some narrowness of expression or interpretation all other questions should be settled, and the question of compensation for all other lands determined, except the railway's claim to this particular area.

I do not believe, however, that the expression requires any construction. The Indians are the wards of the government. In providing for them the United States is exercising its sovereign authority, and hence a reservation for Indians is as much a government reservation as is one for military purposes, and is clearly within the subsequent phrase of the statute, "governmental purposes."

Counsel show that a considerable portion of the reservation lands had been allotted to individual Indians. There is no proof, however, that any of the allotments was of any portion of the specific lands in controversy, nor is it shown that the allotted tracts have been patented or that they are free from ultimate disposition by the government. I think, however, that,
885 even if those things were shown, yet the reservation in which the allotments occurred would still be a government reservation, because it would be under the police and control of the government. As an analogy, moneys, individual and tribal, owed the Superintendent of an Indian reservation, constitute a debt due the United States. Bramwell v. United States Fidelity & Guaranty Company, 269 U. S. 483.

Finally, I do not think that the condition at this time governs either as to whether the reservation was governmental within the 1929 act or as to whether the lands are to be considered as unoccupied and unappropriated. Rather, their status when withdrawn governs. If the company is entitled to select the lands now and to have compensation for them, it is because they were taken out of the indemnity limits and appropriated by the United States, at a time when the railway had a right to look to them for indemn . That it afterward conveyed the lands

away, or peopled them with Indians, or did anything else with them that the company could not prevent, should not improve its position nor weaken that of the company, any more than the rights of the railway to compensation for lands in the forest reserves should be held to be defeated by any action of the government in permitting homestead entries therein, or in making any other disposal of the lands which it has withdrawn for its purposes. The lands were all unsurveyed at the time of their withdrawal, so that the company could not have selected them. The fact that the government withdrew them negatives the idea that they were occupied or appropriated under some other claim.

I conclude that the Northern Cheyenne lands fall in for consideration with the other withdrawn lands.

886 The net result of my rulings upon the Absaroka and Beartooth, Fort Ellis, and Northern Cheyenne lands is to remove from possible selection by the railway company, in satisfaction of its unused losses, only the 3,300.82 acres of Fort Ellis lands. As will hereafter appear, other lands remaining in the forest reserves exceed the ascertained deficiency, so that so far as quantity alone is concerned, the withholding of the Fort Ellis lands has no practical effect.

VIII

SUBSTITUTION OF LOSSES

N. P. exhibit 138, revised, discloses the company's proposal for substitution of base or rearrangement of losses. Having selected indemnity on certain specific losses, it asks that it be permitted to assign other losses to support these selections and to have back for use elsewhere the losses originally assigned. The several items involved are as follows:

Having used 786.98 acres of Minnesota subsequent losses in first indemnity limits it asks leave to substitute prior and mineral losses in order that it may have the subsequent losses to use in Minnesota second indemnity limits. The second item is the reverse; it is a proposed substitution of 1,019.36 acres of subsequent losses to make good an assumed error in the selection of lands in second indemnity limits on prior losses. I have held that prior losses may be used in second indemnity to the extent of and subject to the conditions stated in the resolution, and hence these two items of substitution are unnecessary and need not be further examined.

The next three entries represent rearrangements on account of correction of lateral limits in Montana and Idaho.

887 Redrawing the limits threw some lands formerly in first indemnity limits into second; hence it was assumed that subsequent losses should be assigned in lieu of prior and mineral losses originally used. But, as I have said, I do not consider any substitution necessary, though care should be observed lest lands in second indemnity be taken beyond the quantity of subsequent losses. The company claimed credit for "taking the bitter with the sweet" in thus offering to give up some of its meager stock of subsequent losses in exchange for mineral losses, of which it has an abundance. Plaintiff insisted that the defendant was endeavoring to get credit which it did not deserve, because by succeeding items it again furnished mineral losses in an amount sufficient to get back the subsequent losses just given up; and plaintiff called this process "resubstitution." It is evident that the company was proposing only to supply, in the aggregate, enough mineral losses to release the desired measure of subsequent losses, including those offered upon the lateral corrections. I find nothing about it either to praise or to blame.

The next two items, 602,810.73 and 194,617.32 acres, are the significant ones. They represent the company's proposal to supply Montana and Idaho prior and mineral losses in lieu of subsequent losses formerly used in first indemnity limits. Prior and mineral are classed together, but the great preponderance is mineral.

The reason for the proposal to make the substitution or rearrangement is as follows: there are large quantities of second indemnity lands in Montana and Idaho which cannot be taken on mineral base because they are beyond the fifty-mile limit. The company has relatively small quantities of unused general losses, but has, as said above, an abundance of unused mineral losses.

888 Many years ago it used quantities of subsequent losses in first indemnity limits all along the line, where it might have used, or might now use, mineral losses. Hence it asks leave to substitute by putting its mineral losses there now, and having back its subsequent losses to use out in the sixty-mile belt.

The remaining three items represent other occasions for substitution. The purpose of the first is to put mineral losses instead of subsequent losses in a situation where land was withdrawn for a military reservation after the date of the grant and before definite location, the loss being treated as a subsequent loss, and where later the land was ascertained to be mineral, constituting it a mineral loss, the company wishing return of its subsequent losses on its substituting mineral. The last two items represent the supplying of prior or mineral losses in lieu of losses suffered under the grant of 1870 and mistakenly used to select lands in

the grant of 1864. The government has indicated no objection to these incidental substitutions.

The discussion will therefore pertain to the proposed use of mineral losses to release subsequent losses, represented by the two large items mentioned above. The request is a most important one, for unless it be allowed the company will have left about 800,000 acres of unused and unusable mineral base, and will, to that extent, not be able, all other questions aside, to satisfy the deficiency in its grant.

On occasion the Land Office has permitted rearrangement of losses, as where the selection list was still pending, or where it had itself induced an error. Its attitude is indicated by two decisions:

In Northern Pacific Ry. Co. (March 26, 1908) 36 L. D. 328 the company had offered prior losses for selection of second indemnity lands, and the selections had been held for cancellation. On motion for review the company claimed either that the selections should be granted on the prior losses or that it should be permitted to substitute subsequent base formerly used in first indemnity limits, supplying prior losses in lieu of the base so taken. First Assistant Secretary Pierce held that the resolution of 1870 excluded the use of prior losses in the selection of lands in the second indemnity belt, but said (p. 331):

889

"There is, however, merit in the argument that the company having used losses in support of selections in first indemnity limits, which if free might be used in support of selections in second indemnity limits, and there being other unsatisfied losses available for first indemnity selections, the Department should release those bases formerly used upon the substitution of other unsatisfied bases and permit the released bases to be used in support of the second indemnity selections here in question. This will be done subject to the limitations suggested in your office letter September 5, 1907, above quoted (suggesting that protection be afforded to intervening homesteaders and timber and stone entrants). All rights initiated upon these lands under any of the public land laws at a time when they were freed from the pending selections and subject to appropriation will be protected, but otherwise the company will be permitted to proffer substitute bases for the consideration of your office."

Later, in Northern Pacific Ry. Co. (July 27, 1915) 44 L. D. 218, the company applied to substitute certain mineral losses for a like quantity of first indemnity lands. The sequence of events was as follows: for certain North Dakota first indemnity selections the company designated as base a list of place losses between

Superior and Ashland, Wisconsin, within the Portage conflict. The Department held (Nov. 13, 1895) that the grant did not extend east of Duluth, and gave the company 60 days within which to designate new base. The company designated second indemnity lands in the Crow Indian Reservation, Montana, and upon that base the North Dakota indemnity selections were
890 patented. Subsequently, the Supreme Court held that the company's grant extended east to Ashland. The company thereupon requested that the Wisconsin base be reinstated and the Crow base released, upon the ground that the grant in Montana was deficient and that the Wisconsin losses did not afford valid base for second indemnity selections in Montana, while the Crow losses did. This request was granted "in order that the company might not be prejudiced" by the Department's decision of Nov. 13, 1895, which the Supreme Court had held to be erroneous. The company then asked to further substitute mineral base for the Wisconsin base, because, in part, the latter could be used for coal and iron lands, while the mineral losses could not. In support of this further request the company cited 36 L. D. 328. First Assistant Secretary Jones, denying the request, said (p. 219):

"It will be observed, however, that in that case the selection was unpatented and the proffered substitute bases were of similar character to the original bases. In the case here under consideration, the list has been patented without inquiry as to the coal or iron character of the lands, and if the mineral bases were allowed to be substituted, as now requested, it would be necessary to have an examination made to determine whether the selected tracts contain coal or iron. This would virtually mean the reopening of a case where the selected tracts were correctly patented years ago and an examination by the Government of lands which have passed beyond the jurisdiction and control of the land department. Manifestly such an examination is unwarranted and cannot be authorized."

It is clear from the foregoing that the Secretary of the Interior regarded the substitution of base as something to be allowed or rejected in the course of due administration of the grant. For such reasons as appealed to him as sufficient, he permitted substitution. In other cases, for like reasons, he denied it. There was no question in the Land Department, at any time, of its authority in administering the grant, to permit or to deny
891 substitution in the interest of justice. I think this view of the Secretary's powers is correct. As the submission of base was a mere matter of orderly administration, I can see no reason why the regulations prescribed by the Secretary might

not be altered or bent to suit the situation, and to do justice between the United States and the company. When the evidence on this subject was offered, I expressed the view that the authority of this court did not extent to administrative methods, but that the grant came here under the act of 1929, as it stood at that date, and that the review of the previous administration of the grant was limited to the correction of errors in law or fact. I now think that I was partially in error in the impression I then had. Were the grant now committed to the Secretary for adjustment, as it had been before the act of 1929, I am quite clear that his power to revise all administrative steps, for good reason, could not be doubted. I think that it would be his duty to adjust the grant so as to do justice between the parties, and, if necessary, to permit substitution of base, or any sort of reassignment of losses and selections of indemnity, that would conduce to that end. Of course, he should act with sound administrative discretion, not arbitrarily nor capriciously, but on reasons which appealed to his administrative judgment as sufficient. I am now of the opinion, therefore, that such adjustment of the grant is committed to this court, with the same power and authority possessed by the Secretary under the previous statute directing him to adjust. The only difference is that the Secretary should have acted, and doubtless would have acted, with a sound administrative discretion, while the court can act, and should act, only in accordance with sound judicial discretion, meaning, of course, a discretion in the application of established
892 practices and principles of equity. With that single difference, I thing that this court is invested with authority to so adjust this grant as to do equity between the United States and the company, and that, wherever, for the purpose, reassignment of base is necessary, this court may allow it if no equitable principles stand in the way. What I mean to say is that so far as concerns the subject per se, this court now has authority to deal with it judicially as fully and completely as, under previous statutes, the Secretary was authorized to deal with it administratively. The only question, therefore, remaining is whether or not this court should, in the exercise of sound judicial discretion, and in accordance with recognized principles of equity, allow or refuse the request.

Now primarily, and at the base of this discussion, lies this broad principle of equity, that the United States is presumed to intend to gratify its grant to the company, if it may do so. The applicable maxim is, "Equity imputes an intention to fulfill an obligation," and its general purport is stated by Mr. Pomeroy in Pomeroy's Equity, Sec. 420 (3rd Ed.):

"This principle is the statement of a general presumption upon which a court of equity acts. It means that wherever a duty rests upon an individual, in the absence of all evidence to the contrary, it shall be presumed that he intended to do right, rather than wrong; to act conscientiously, rather than with bad faith; to perform his duty rather than to violate it."

Primarily, the foundation equity in this case is that the grant ought to be satisfied if it can be done without violence to established principles, or without injustice to the United States, so that if there were no reasons for allowing or refusing the substitution, other than those inhering in the application itself,
893 I should think it ought to be allowed, for in no other way can the government fulfill its obligation.

Next applies the maxim, "He who seeks equity must do equity." Substitution may be required under that principle without further refinement. Looking at the question at large as it now stands, it is within the sound judicial discretion of this court to permit this change upon the broad general principle that the court will require the plaintiff to do equity. No wrong is done to anyone; the United States is not disadvantaged in anywise except in having to carry out its agreement with the company; and as this is a final adjustment of the grant and as the Secretary, if he were adjusting, might within his administrative discretion permit the substitution, so this court, within its judicial discretion and in conformity with the principles of equity, might, and under all the circumstances of the case I hold should, permit it.

If, however, a specific head of equity be required to support the substitution, it may be found. Here, in brief, is the case:

When the Act of 1864 was passed the Statutes at Large were printed by Little & Brown under a contract with the United States, and not by the Government Printing Office, as now. However, each volume contained a reference to the act of Congress reciting that the edition had been "carefully collated and compared with the original rolls in the Archives of the Government under the inspection and supervision of the Attorney General of the United States, as duly certified by that officer," and that the laws so published should be competent evidence of the several public and private acts of Congress in the courts and in all the tribunals and public offices of the United States without
894 further proof or authentication. The grant of 1864 appears in 13 Stat. 365. There the mineral indemnity provision reads as follows:

"That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-

numbered sections, nearest to the line of said road may be selected as above provided:"

The words "and within fifty miles thereof" are omitted.

For something over forty years all concerned understood the published statute to be as enacted and enrolled.

In 1904 the company filed a selection list in the Helena Land Office for some 3,000 acres of land in the second indemnity belt, assigning as base a corresponding area of mineral losses. The Commissioner of the General Land Office referred the list to the Secretary of the Interior for advice. While the matter was pending, the company's land attorney, Mr. Mason, in reading the debates in Congress, inferred that the act might have been incorrectly printed. He asked the company's attorneys in Washington to consult the enrolled bill, and thus the error was disclosed. The Secretary of the Interior was notified, and the company substituted general losses in support of its selections. The error in quoting the statute occurs both in the statement of the case and in the opinion of the court in Barden v. Northern Pacific Railroad Company, 154 U. S. 288, decided in 1894. Even after the error was discovered and communicated to the Commissioner, the officers of the Department of the Interior continued to quote the act as published. Assistant Secretary Ryan did so August 30, 1905, in 34 L. D. 105, and Secretary Ballinger October 24, 1910, in 39 L. D. 314. As late as December 12,
895 1911, in 41 L. D. 576, Assistant Attorney General Cobb referred to the discovery as "recent," saying:

"The words underscored 'and within fifty miles thereof,' do not appear in the law as published in the Statutes at Large, recent discovery of the omission being responsible for one of the questions in the present controversy, * * *"

Attorney General Wickersham's reference to the error, in 41 L. D. 572, follows. Not until then does the mistake appear to have been fully apprehended by the officers charged with the administration of the grant.

It is true that Mr. Schwarm testified that in the very early days the company had a correct copy of the statute, as enacted, in its possession. At that time, however, the question could not have come up, or been of any importance, because then, and for long after, there were no ascertained mineral losses; and, as the years went by, those having to do with the grant left the employ of the company, and are all now dead. So through all the time with which we are here concerned it is apparent, without dispute, that both the railroad and the Land Office and the Attorney General's office, indeed the courts of the United States, regarded the statute as correctly printed, and all were unconscious

of the error. In the very nature of things, no one desiring to consult the statute would have dug up from the file a loose copy; but naturally, and I might almost say of necessity, the officials of the railway would, as did the court and the men in the Land Office, pick up the volume of the Statutes at Large and look at the act as there printed.

In my own office, for years, we have received copies of the various statutes as passed by the legislatures. They are looked through first to see whether there are any emergency
896 measures, and to get a cursory view of the laws with which we must conform when they go into effect. They are loosely filed in some appropriate place in the office, and when the published volumes are printed and received, no further reference is made to those loose leaves. There is neither necessity nor reason for it. It would be a most preposterous idea that, because in one of the loose-leaf advance sheets the statute was correctly printed and showed the terms of the law as passed, and in the published volume some word or phrase was left out, we should be charged with notice of the error. I should say that such an idea would never be put forward except in the exigencies of a lawsuit. Of course, what form the copy Mr. Schwarm refers to was in, where it was kept, what, if any, use was made of it at the time, is not disclosed by the evidence and after all the years could not possibly be shown; but it appears to me so plain that, after the printed volume was received, everyone desiring to consult the statute disregarded, and in time came to forget, the copy, and to rely upon the printed text, and it only, that I think there is no room for even a doubt upon the subject.

The fact of this mistake being undisputed, a second question is whether it may be said upon this record that it influenced the company in making its original assignments of losses and selections of indemnity. In the nature of things, of course, no direct evidence can be had, as there is no person living who could know the fact; but I should say that the influence may be fairly and reasonably inferred. Men act in accordance with their interests, upon the facts as they understand them. The company used up its general losses within first indemnity; it did not assign its mineral losses. Now it is obvious that had the land
897 department of the railway understood that it could use its mineral losses only in first indemnity limits, while second indemnity limits were open to its general losses, it would not have exhausted first indemnity, leaving itself nowhere to satisfy its mineral losses, present or prospective. It is a plain inference from the facts, it seems to me, that mineral losses were reserved to be assigned upon the theory that they might be used any-

where nearest the line of the road. I have no difficulty whatever in saying that it sufficiently appears from the testimony that the company did act to its prejudice in reliance upon the statute as printed, and that had the statute been correctly printed, or had the company's officers then known of the mistake, it would have acted differently. So we have then here a mutual mistake on the part of the officers of the land department of the United States, and the land department of the Northern Pacific as to the statute, and as to the consequent rights of the company and the United States under that statute, and a course of action to the detriment of the company.

The first objection is that this was a mistake of law. Obviously, for several reasons, the objection is not sound. In the first place, within the meaning of that phrase, the statute making this grant to the Northern Pacific is not a law. It is a private statute, and the error occurs in the granting section of that statute. It is true that these railroad granting acts are laws as well as grants, but they are laws only in the sense that they express the will of Congress and that the railroad company is bound by that will, and, when it accepts the grant, it accepts it as the Congress of the United States intended. In no other sense is it a law. But even if by a stretch of speech it
898 could be called a law within the meaning of the doctrine that equity will not relieve against mutual mistakes of law, the result would not be at all altered.

The principle is thus declared in Pomeroy's Equity, Sec. 849 (3rd Ed.).

"Sec. 849. Relief where a Party is Mistaken as to his Own Existing Legal Rights, Interests, or Relations. Is it possible to formulate any general rule which shall be a criterion for all cases of relief from mistakes of law pure and simple, and without other incidental circumstances, which shall be sustained by judicial authority, and which shall furnish a principle as guide for future decisions? In my opinion, it is possible. It has been shown that where the general law of the land—the common jus — is involved, a pure and simple mistake in any kind of transaction cannot be relieved. Also, where a person correctly apprehends his own legal rights, interests, and relations, a simple mistake as to the legal effect of a transaction into which he enters, in the absence of other determining incidents, is not ground for relief. There is, as shown in a former paragraph (Sec. 841), a third condition. A person may be ignorant or mistaken as to his own antecedent existing legal rights, interests, duties, liabilities, or other relations, while he accurately understands the legal scope of a transaction into which he enters, and its legal effect upon his rights and liabilities. It will be found that the great majority, if not indeed

all, of the well-considered decisions in which relief has been extended to mistakes pure and simple fall within this class; and also, that whenever cases of this kind have arisen, relief has almost always been granted, although not always on this ground. Courts have felt the imperative demands of justice, and have aided the mistaken parties, although they have often assigned as the reason for doing so some inequitable conduct of the other party which they have inferred or assumed. The real reason for this judicial tendency is obvious, although it has not always been assigned. A private legal right, title, estate, interest, duty, or liability is always a very complex conception. It necessarily depends so much upon conditions of fact, that it is difficult, if not impossible, to form a distinct notion of a private legal right, interest, or liability, separated from the facts in which it is involved and upon which it depends. Mistakes, therefore, of a person with respect to his own private legal rights and liabilities may be properly regarded—as in great measure they really are—and may be dealt with as mistakes of fact. Courts have constantly felt and acted upon this view, though not always avowedly. Lord Westbury openly declares that such misconceptions are truly mistakes of fact. Some very instructive remarks
899 of Sir George Jessel, which I have placed in the foot-note, will, with a slight modification of his language, apply to all instances involving this kind of error or ignorance. A general rule permitting the jurisdiction of equity to relieve from mistakes of the law pure and simple, in all cases belonging to this species, and confining its operation to them, would at once reduce to clearness, order, and certainty a subject which has hitherto been confessedly uncertain and confused. It would work justice, for these kinds of errors stand upon a different footing from all others, and justice and good conscience demand their relief; it would conform to sound principle, for these mistakes are in part essentially errors of fact; and finally, it would explain and harmonize many decisions of the ablest courts which have hitherto seemed almost inexplicable except by violent and unnatural assumptions. I therefore venture to formulate the following general rule as being eminently just and based on principle, and furnishing a simple criterion defining the extent of the jurisdiction. The number of decisions which support it, and which it explains, is very great. Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or

of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact. It should be carefully observed that this rule has no application to cases of compromise, where doubts have arisen as to the rights of parties, and they have intentionally entered into an arrangement for the purpose of compromising and settling those doubts. Such compromises, whether involving mistakes of law or of fact, are governed by special considerations."

It is too plain for discussion that the mistake we are here considering comes flatly within the rule stated by Mr. Pomeroy. I shall not trouble the court with reference to cases at large. Mr. Pomeroy discusses the whole subject, commencing at Section 841, with footnotes and illustrative cases, and points out the limits of the doctrine one way and the other.

The next objection is that the company is charged with knowledge of its grant, and hence of the mistake. Obviously,
900 however, that cannot be so. If A and B enter into a contract, the terms of which are all agreed upon, and it is turned over to a stenographer to be typewritten, and, through error and oversight of the stenographer, a material term of the agreement is omitted, and it is not noticed by the parties until years afterward, it would be subversive of all sense of equity and justice that both parties were bound to know what the stenographer had not written. The truth is that it would be a mistake of fact pure and simple, a mistake of the stenographer. So, likewise, it is elementary if the parties enter into a complete agreement, the terms of which they fully understand, and then turn it over to counsel to prepare an instrument to carry out those terms, and counsel, through error or oversight, or even through ignorance of the law, prepares an instrument which does not carry out the agreed terms, the mistake is not one of law by the parties, but one of fact by their counsel. But all this seems to me to be entirely apart from anything necessary to consider. Here was a statute of the United States. Here was a printed volume containing what purported to be that statute as enacted. The courts, the departments of the government, and all private persons were directed by Congress to rely upon that statute as there printed. Both the Department of the Interior and the railway company did rely upon it. Obviously this is so, indisputably so. To call it, under any circumstances, by any circumlocution of words, or refinement of reasoning, anything except a pure mistake of the printer upon which the parties relied, and upon which they had a right to rely, is to overlook the essential nature of the error. What court, what private individual, what

person having occasion to know the terms of a statute, whether it was a public statute or a private statute, would have ever
901 thought of going beyond the terms of the printed volume and examining the enrolled bill in the office of the Secretary of State? It seems to me that the question just put disposes of the whole subject.

Of course the ideal man would not make mistakes, the ideal printer would not misprint a statute; the ideal stenographer would not mistranscribe stenographic notes. The ideal man of affairs, whether of business or a profession, would be guilty of no oversights, no omissions. By that line of thought there would be no occasion for the equity head of relief from mistakes. The doctrine of relief from mistakes is predicated upon the frailty of human faculties. As applied here a common-sense view must be taken. The heads of departments, the whole clerical force of the General Land Office of the government, and the land department of a railroad having forty million acres of land under its supervision all proceeded ordinarily and naturally as men would in their own individual affairs, and so proceeding they accepted the statute as printed, without investigation and without further thought, which they had a perfect right to do.

It is insisted, however, that the company had means of knowledge. In the first place, as said above, it once had a copy. In the next place, it is inferred, if not said, that it might have gone to the Secretary of State's office and examined the enrolled bill. Well, for that matter, so might the government. The government had precisely the same means of knowledge that the company had, no more, no less. The mistake was the mistake of an agent employed by the United States, and it seems to me it would be the grossest inequity to say that that mistake cannot be corrected because the company might have found out that the mistake had been made.

902 It is insisted too, that the defendant has been guilty of laches in that it did not seek earlier relief after the error was discovered. It is difficult for me to see what it could have done other than what it did do. In 1910 it made application to substitute mineral losses for Bismarck lists 54 and 56, involving 11,360 acres and 9,880 acres, respectively. Apparently at or about the time these applications were filed, a similar application had been made upon Fargo list 14, for 23,467.88 acres, as action upon the Bismarck lists was deferred pending decision upon the Fargo list. That decision is the one reported in 44 L. D. 218, cited above, denying the substitution. The subject evidently remained under advisement in the Department for five years. Some of the mineral base then offered and rejected is being of-

fered now in the defendant's request for substitution. Having tried and failed, I do not see what more the company could have done. I can think of no form of legal action that might have been invoked to give to the company any relief from the predicament in which it found itself from this printed error. It is too plain to discuss that it could not have sued the Secretary of the Interior, as that would have been equivalent to suing the United States. It is equally plain that mandamus would not lie against him, for he might refuse that which was within his discretionary power; but, anyway, and all that aside, when this court comes to the adjustment of this grant according to principles of law and equity to do justice, it is bound to give the relief suggested by this readjustment. Counsel in argument several times use the word relief. Well enough, if properly understood. This is not a bill or cross bill calling for relief in equity within the sense in which that phrase is generally used. It is simply a correction of errors resulting under the circumstances already stated, and that is all there is to it.

903 In any event the act of June 25, 1929, directs this court to review the administration of the Northern Pacific grants from the beginning, requiring it to correct any errors. Now to say that the review cannot be had because of lapse of time is to argue that the statute should not be obeyed. I do not think this depends upon whether the railway applied for relief in apt time or not. By the terms of the act under which this suit is brought, so far as concerns this branch of the case, the adjudication is to be made in accordance with equity, disregarding errors in administration. I do not think you can pare off a little here and a little there by saying that the railway might have done this, that, or the other. I say again that a common-sense view must be taken. The officials of the government could not change the statute to the government's disadvantage by their acquiescence or by a misunderstanding of its terms. Neither should the railway's rights be prejudiced by any error of its officials. The terms of the statute were fixed by Congress. Therefore it can make no difference as far as the rights of the government are concerned how many years the grant had been administered under this error. It can make no difference so far as the government is concerned how promptly the company acted after the error was discovered. Aside from the general principle that the rights of the United States can be affected only by act of Congress, the 1929 statute expressly directs this court to review the action of any and every official, and, whenever they were wrong, from misapprehension of the law or misunderstanding of the facts, to correct the error and make it right. Now obviously

this correction cannot be one-sided. If the officers of the government have misadministered the grant at some point and it may be corrected in the plaintiff's interest, then the joint action
904 of these same officers and the officers of the railway, induced by such misapprehension as the mistake under discussion, should likewise be corrected and adjusted to preserve the mutual rights of the parties.

I think it is preposterous to say that the moment Mr. Mason communicated to the Commissioner the mistake in printing the statute, thereupon the railway was forced to jump in and under whip and spur precipitate a reopening of the whole subject. I think it had a right to rely upon the spirit of fairness and justice, and to expect that the Department of the Interior would recognize what had been done under that error and would cooperate in correcting it. But, all that aside, I am convinced that the letter and spirit of the statute of 1929 direct this court to adjust this grant in accordance with the steadfast doctrines of the common law and the flexible principles of equity, and that the ultimate purpose shall be to do justice; and it is little short of a travesty upon that statute to declare that justice cannot be done in this particular instance because, as is supposed, the company did not act promptly.

The reason assigned by the Secretary for refusing in such case to permit the substitution is urged upon my attention as having weight: that the lands had passed beyond the control of his Department, and an examination would be required to determine whether they were coal or iron. Now it may be that this reason was valid enough for the Secretary in the course of the day-to-day administration of the grant, but it is to my mind perfectly plain that it has no validity here. Either the land is coal or iron or it is not. It is a fact which the government of the United States knows from its own records, or can easily ascertain.

It is said that there has been an adjudication by the Department, and that such adjudication is binding and valid until
905 set aside. I have endeavored to follow the reasoning of counsel upon this question but without success. I do not see anything that has been adjudged, except that there had been certain losses and that the lands that were selected were all open for selection and that the selection was allowed. Nothing in this proposed reassignment of losses anywhere conflicts with that allowance, with what was ruled, that I am able to see. It is conceded that there are mineral losses. It is conceded that the company has received the lands on indemnity selections. By the proposed reassignment nothing is to be determined. Everything is known. Everything is admitted. There has been a loss and

the railway has the land. It proposes to keep the land, but to assign different losses for it.

It is also urged that the truth of the whole matter is that the company supposed it would not have a great number of mineral losses, that it was only through the mineral classification that it discovered the tremendous acreage of those losses, and that this really accounts for the manner in which it assigned losses and made indemnity selections. I fail to see how that enters into the question at all. Whether the company thought it would have many or few, obviously, it intended to reserve the mineral losses, whatever they were, to be used anywhere it saw fit nearest the line of the road, supposing there was no limit of distance. Obviously, too, it would not have done that except for the error in printing the statute.

The United States claims that the company had a choice between using its subsequent losses in first indemnity or leaving the first indemnity limits exposed to settlers until its mineral losses should be established, and that it is bound as by an election.

No election is binding unless the facts are known or ought
906 to have been known to the party electing. If the election was made in ignorance of material facts, then it ceases to be binding. This is too fundamental to require discussion. If, as I have held, it is established here that the company elected to use its general losses in first indemnity limits because it supposed by reason of the printed statute it might use its mineral losses beyond first indemnity, assuredly the election was made in ignorance of the controlling fact that it could not so use them, and it follows as a consequence that the election was not binding. Certainly if the company made its election wholly independent of whether the mineral losses might be satisfied beyond the fifty-mile limit, the error in the statute could not enter into the question; but I repeat, it seems to me plain that it must have made its election upon the statute as printed and in ignorance of the restriction now said to control.

When the last map of definite location in Montana was filed in 1883, the general losses exceeded the vacant land in first indemnity limits. It was therefore certain at that time that second indemnity limits would be necessary. The company made no effort to have them laid down or to have the land surveyed so that it could make selections there for its losses, but, instead, satisfied them, including subsequent, in first indemnity. As said in the discussion of the agricultural issue, there was no evidence nor intimation that the land in the first indemnity belt was more valuable than that in the second. The company may have thought that its mineral losses would be so small that there would be

enough land left in first indemnity to satisfy them when they were established, but on the other hand, its course was consistent with a belief that when the time came the mineral losses could be satisfied "nearest the line of the road" without further territorial restriction.

907 The company was contending that only lands known to be mineral were excluded from the grant, whereas the United States was contending that all mineral lands, whenever ascertained to be such, were excluded. That was the issue in the Barden case, to which I have referred. It came up in the Circuit Court for the District of Montana in 1891. The Supreme Court finally held, in 1894, after the case was twice argued, that lands ascertained to be mineral at any time before issuance of patent to the company were lost to the grant, thus greatly increasing the probable mineral losses over what the railway had been contending. During those years the company was certainly put upon notice that its mineral losses might be considerable. It was following a suggestion in that case that Congress directed mineral classification of all the lands in the place and indemnity limits. The statute directing it was passed January 25, 1895, and the classification began that year. Yet in that year the company used 800,000 acres of Montana subsequent losses in first indemnity. It used 44,000 the following year. There is no evidence that the first indemnity limits were being settled up so fast that the company had to rush its subsequent losses in there to get ahead of settlers; no evidence that it could not at that very time, have applied mineral losses instead. Its action is just as consistent with an assumption that it made no difference which it used, as with the theory that it was consciously being put to an election and "played the indemnity limits" in the way that seemed most advantageous, as suggested in the government's brief. There was an admitted mistake touching the very conduct in question. On the evidence one cannot say that a course of

908 action which might have been induced by the mistake and which might, and actually did, work a disadvantage unless it be corrected, would have been pursued anyway. It seems to me that the error was so vital, the consequence so large, that it ought not to take overwhelming evidence, nor indeed very strong evidence, to justify a ruling that action which would naturally follow the error was the result of it. Of course if the testimony showed the action to have been for some other reason, the court should so regard it, but I do not think the court ought to speculate some other reason.

Aside from all this, however, I do not think the common-law doctrine of election has application to selections made as indemnity for place losses. First, the company did not have an un-

qualified and an unhampered choice in its selections. Lists were required to be submitted to the Secretary. They might be allowed or disallowed, either in whole or in part, not, of course, capriciously, but discretionally, for reasons which seemed to him to justify his action. As essential element of election is that it "may be asserted at the will of the chooser alone. * * * In all such cases the characteristic fact is that one party has a choice independent of the assent of anyone else." Mr. Justice Holmes in Bierce v. Hutchins, 205 U. S. 340, 346.

Next, the process of selecting indemnity lands for place losses was necessarily a recurring action throughout the years. The subject was complicated. For certain losses certain sorts of land might be selected, for other losses other sorts. For some losses the railway might go into one territorial limit to select indemnity; for certain other losses it was confined to another area. The quantity of mineral losses could not be apprehended at the beginning of the administration of the grant; it was not until 1895 that the mineral classification began, and it 909 was not until its completion some ten years later that the aggregate of those losses could be ascertained. The condition of lands both in place and in indemnity limits was constantly shifting. The grant has been under administration nearly three quarters of a century. Complications have arisen, such as the restoration of lands to place limits, the enactment of several so-called lieu statutes, the classification for coal, and the withdrawal, beginning with 1898, of great tracts for forest reserves. Now, to inject into this situation the proposition that whenever the railway company made a selection it had thereby elected irrevocably not only to take those lands, but to take them for those particular losses, and that its election bound it for ever and a day is to apply the common law doctrine of election in a manner without precedent, and to a condition where obviously it does not fit. But even if this view is wrong, it cannot seriously affect the question. If a court of equity, under the maxim that he who seeks equity must do equity, may require a plaintiff who is the victim of a usurious contract to do justice by paying the debt with lawful interest, in other words, to carry out his contract after the usury has been expunged from it; if it may require a plaintiff, as a condition to granting him relief to waive the statute of limitations, Pomeroy's Equity (3rd Ed.) Sec. 393; there ought to be no trouble in holding that the court may require the government here to waive its claim of election in respect to selected lands and permit an opening up of the subject to do justice. It must be continually borne in mind that the doctrine of election is a common law doctrine, that it often work hard-

ship and injustice, and that it would so operate if applied here to each selection, or to any considerable number of selec-
909 tions made during the years. One of the very things giving rise to equity jurisprudence is the hardships and inequities frequently resulting from the application of stern and unbending common-law rules to a given situation. To my mind it is perfectly clear, therefore, that, if the doctrine of election has application here, and if it might be said at common law that the company had elected, and that the election was not made in ignorance of a mistake which prompted it, and but for which it would not have been made; if, in short, the contention of the United States that there was an irrevocable election at law is to be sustained, still it remains most certainly true that in this case, under the principle of requiring the plaintiff to do equity, the election cannot prevail to prevent substitution.

I hold that the error in printing the statute not only amply supports the conclusion that substitution should be permitted as a condition of awarding plaintiff the relief which it asks, but also, of itself, necessitates the allowance of defendant's application.

My conclusions upon this whole subject are, first, that even had there been no mistake in the printing of the statute the general equitable considerations to which I have referred would demand that the rearrangement or substitution be allowed; second, that the admitted mistake in the printed statute, I find as a fact, influenced the company in using up the indemnity lands within the fifty-mile limit from the road for its general losses. Had it not been for this mistake, it is as certain as anything can be that it would have gone for those losses into second indemnity and reserved first indemnity for its mineral. It is impossible for me to believe that the company would have unneces-
911 sarily used up its first indemnity lands if it had known that thereby it would be unable to satisfy its mineral losses. In the third place, I think that the question of laches raised by the government has no application here, and that if it has, there has been no laches within the sound view of that doctrine. The company is not an actor, even, in this action. It is not coming into a court of equity seeking affirmative relief within the meaning of the doctrine of laches. The United States has brought this suit, and one of the purposes of the suit, the purpose now under consideration in this hearing, is to adjust the grant; and there inheres in this very purpose the principle that it shall be correctly and equitably adjusted. Even without application for that relief it would be the duty of the court to grant this reassignment. It is but a link in the whole process of ad-

justment; in no sense is it an application for affirmative relief as by cross bill. And, finally, I am of the opinion that the common law doctrine of election has no application to the selections made by the company from year to year during the administration of this grant, but that, if it should be held to apply, still the mistake in the statute would relieve it from the fact of that election; and that, in any and every event, moreover, the court, under the maxim of requiring the plaintiff to do equity, will, if necessary, set aside the election and readjust without reference to it.

Other reasons are assigned by Mr. Frost at some length, some of which do not appeal to me and others of which seem of such slight importance that I do not think it necessary to discuss them. So also with some of the objections urged by the government, which I think insufficient to overcome the equitable doctrines already stated, which appear to me to be controlling.

912 I am content to rest my opinion upon what I have written, unless, as claimed, the railway has failed to show that the lands sought to be supported by mineral losses are not valuable for coal and iron, so as to exclude them from the term "agricultural."

It is first insisted this fact must be proven by clear and convincing evidence, and certain authorities are cited. I hold that the burden of proof is upon the company because it is seeking to have this substitution made, and it must show it is entitled to it; and as this element of coal or iron is one of the factors in the problem it must go forward and offer proof, which must necessarily be of an apparently negative character. I hold, however, that the notion of some of the officials of the Land Office that this evidence has to be clear and convincing is without foundation. The doctrine of the clear and convincing character of evidence has its origin and its application in certain classes of cases, and it extends no further. He who alleges fraud, it is said, must prove it by clear and convincing evidence, because fraud will never be presumed, and because every presumption is against him who asserts it. So if an executor or an administrator deals with the heir-at-law, shortly after the heir comes of age, it will be presumed that an undue influence had been exercised; that the youth and inexperience of the heir had been taken advantage of, and therefore, it is said, and properly, that when he sets up title acquired from the heir at this time, he must show by the most convincing evidence, first, that there was no element of undue influence or fraud exerted, and moreover, that the transaction was in every way fair and just to the heir. So of the relation of guardian and ward, and of trustee and cestui que trust. Obviously, all these cases rest not only upon the

913 principle of undue influence, but upon the further principle that the facts are within the exclusive knowledge of the trustee, the guardian, the executor, the administrator. So, likewise, if one wrongfully obtains possession of another's property and disposes of it in one way or the other and offers to return what he received for it, the burden is upon him to show by clear and most convincing evidence that he not only got a fair price for it, but also that the negotiations by which he sold it were of such a character that he could not have received any more. The facts of the disposal were within his knowledge. He has no right to call upon the person whose property he has made away with to offer proof. He must prove the whole case and prove it by clear and convincing evidence. In general, it may also be said that in any case in which, in the nature of the transaction, the facts are within the exclusive or substantially exclusive possession of one party, he must go forward and prove clearly and convincingly what those facts are. Now all this rule as to clear and convincing proof, as used by the courts, means this and this only, that the court must be certain that nothing has been concealed; that the person who has exclusive knowledge, substantially so at least, has made a clean breast of the whole transaction. He must explain to the minutest detail, so far as the nature of the case permits; but when he has done so, he has then carried the burden imposed upon him. Now, how by any possibility these principles can be applied to the proof of the coal or iron character of this land is beyond my comprehension. The company knows no more about it than does the government. It has no greater means of acquiring knowledge than has the government. On the contrary, I should say the government, by its geological survey, and by the general course of
914 its examination of the public lands of the United States to the westward of the Mississippi River, would have more knowledge, would have more opportunity for accurate knowledge, of those facts than has the railroad. Of course, it is impossible for the company to show that there are no coal or iron deposits on these lands. It is like trying to prove that there is no gold in a mining claim. It would require not only a surface, but a subsurface, examination of every section or half section or quarter section, as the case might be. It is enough for the purpose of making out a first-instance case, for the company to show that there are no known deposits of coal or iron upon these lands, and that they are not surrounded by coal and iron lands, so that there might be some presumption that the veins or deposits extended into their boundaries. Any ordinary and reasonable proof which makes a prima facie case that the lands were open to selection for

mineral losses is sufficient to require the government to go forward with its evidence. Now the Government has offered in this case no proof upon these questions whatever, and it is necessary, therefore, only to examine, in view of what I have just said, the kind and extent of the evidence offered by the defendant.

Mr. Schwarm testified that he had been in charge of the railway's coal leases for many years; that some of the lands had been classified by the Department of the Interior, pursuant to statute, as noncoal; that some had been withdrawn for coal classification and later released; and that no part of the balance was located in an area known to contain coal. It seems to me that this evidence is not only competent but that it has reasonably convincing force. I should say that without question any person familiar with the Palouse country might testify that there are no gold or silver or coal or iron mines there.

915 That is not to say, as a geological possibility that there might not be some, but only that none is known at the present time. Mr. Schwarm certainly made a prima facie case in view of the government's classification or nonclassification of substantial portions of the land. Without going further into the details of his testimony, plaintiff offering no evidence, I am bound to find that the lands are noncoal.

As to the noniron character, Mr. Schwarm went no further than to say that he used the utmost care to make sure that the lands had no value for iron. The company in its brief said that geological literature, of which the court might take judicial notice, negatived the possibility of any of the lands being iron lands. I do not consider that Mr. Schwarm's statement amounted to evidence upon which a finding could be based; and as the company did not cite any specific documents, I addressed a letter to counsel on both sides inviting citations to literature and documents bearing upon the case. Mr. Frost supplied me a list of publications, and upon some of them made certain comments which are noted below, with the citations as follows:

MINNESOTA

Monograph No. 52, United States Geological Survey (1911), C. R. Van Hise and C. K. Leith.

Bulletin No. 27, March 17, 1937, of University of Minnesota, by E. W. Davis, entitled "The Iron Ore deposits of Minnesota."

(The literature in reference to iron deposits in Minnesota is very voluminous. Since the above monograph No. 52 there have been many smaller publications that discuss one or the other of the well-known districts.)

NORTH DAKOTA

(Our geologists do not know of any publication that mentions an iron deposit in the state of North Dakota, so the documents here mentioned are negative.) University of North Dakota, Departmental Bulletin No. 11, Geology and Natural Resources of North Dakota issued by Division of Mines and Mining Experiments in cooperation with North Dakota State Geological Survey.

916

18th Biennial Report of the State Geological Survey, 1933–1934.

19th Biennial Report, North Dakota Geological Survey, 1935–1936.

MONTANA

United States Geological Survey Bulletin No. 507 (1912), entitled, "Mining Districts of Western United States," p. 2 (29).

United States Geological Survey Bulletin No. 715 (1921), Iron Ore Deposits Near Stanford, Montana, pp. 85–92.

United States Geological Survey Bulletin No. 540 (1912), Beds on Blackfeet Indian Reservation, Montana, pp. 329–337.

United States Geological Survey Folio No. 56, Little Belt Mountain Quadrangle. Iron Ore, Woodhurst Mountain (found next to last printed page of folio).

War Department Report on Available Raw Materials for Pacific Coast Iron Industry, Vol. 3, Montana Iron Ore, pp. 2–5, inclusive, of Appendix E–1.

United States Geological Survey Professional Paper No. 78; Geology and Ore Deposits, Phillipsburg Quadrangle.

United States Geological Survey Professional Paper No. 74, Geology and Ore Deposits, Butte District.

IDAHO

United States Geological Survey Bulletin No. 507 (1912, p. 26.

Twenty-second Annual Report, United States Geological Survey (1900–1901), Part II, p. 638.

War Department Report on Available Raw Materials for Pacific Coast Iron Industry, Vol. 3, Appendix E–1, pp. 11–15, inclusive.

WASHINGTON

Bulletin No. 27, State of Washington Division of Geology, pp 37–115.

Annual Report for 1901, Washington Geological Survey, Vol. 1, Part IV, Iron Ores of Washington.

United States Geological Survey Bulletin No. 285 (1906), p. 195.

United States Geological Survey Atlas, Snoqualmie Folio No. 139, Geology of Snoqualmie, Quadrangle.

Bulletin No. 2, September, 1917, Washington State University Bureau of Industrial Research, Investigation of Iron Ore Resources of Northwest.

Transaction 30, pp. 356–366, American Institute of Mining Engineers (1901), Cle Elum Iron Ores of Washington.

War Department Report on Available Raw Materials, Etc., Vol. 3, Appendix E-3, pp. 3-21, inclusive. (This report on page 4 shows that the entire production of iron ore for the years 1926–1933, inclusive, came from Big Iron Mine Stevens County.)

917 The publications themselves were all obtained from the public library and made available to me, except the two Biennial Reports for North Dakota, U. S. Geological Survey Bulletin No. 715 (1921), Iron Ore Deposits near Stanford, Montana, which was missing from the library's bound volume, and the War Department Report on Available Raw Materials for Pacific Coast Iron Industry. The company also submitted a map of each state showing the townships within which the selected lands lay and the location of known iron deposits with relation to them. It advised me that copies of its letter and of the list of publications and the maps would be furnished to plaintiff's counsel. I later received the following letter from Judge Biggs:

DEAR MR. GRAVES: We received from Mr. Frost a list of publications in reference to iron deposits, enclosed in his letter to you of May 22nd. The investigation which we have had made of the publications of the United States Geological Survey do not show any published documents of the Geological Survey other than those listed by Mr. Frost, except we find that there is Plate I, Professional Paper No. 184, Pre-Cambrian Rocks of the Lake Superior Region, by C. K. Leith, R. J. Lund, and Andrew Leith, U. S. Geological Survey, 1935, dealing with iron deposits in Minnesota. We know of no publications by the various states other than those listed by Mr. Frost.

We are sending a copy of this letter to Mr. Frost.

Very truly yours,

J. CRAWFORD BIGGS,
Special Assistant to the Attorney General.

I shall hand you herewith the letters from counsel and the maps to which I have referred. Only 320 acres in Minnesota are involved in the proposed substitutions, and though they appear in the general direction of the course of the great iron

deposits in that state, they are thirty miles from any indi-
918 cated occurrence. The bulletin of the University of North Dakota concerning its geology and natural resources contains no reference to iron, dealing principally with the deposits of lignite and clay. Bulletin 507 of the Geological Survey, Department of the Interior (1912), contains the following comment upon iron in the three remaining states:

(p. 26.) "Idaho contains few deposits of iron ore and none of them are mined at present. Iron Mountain in Washington County, near Snake River, is the principal locality."

(p. 29.) "No important deposits of iron are known in Montana. Manganese has been mined at one or two places in Jefferson County."

(p. 42, Washington.) "Iron ores are present at a number of places, but are not as yet utilized. Magnetite is found at Snoqualmie Pass, in King County, in connection with metamorphosed limestone, and on Skagit River, in the northern Cascades, as lenses in slate. Chromiferous magnetite appears at Clealum, in Kittitas County, on the contact between sandstone and serpentine. Brown iron ore and bog iron is found at several places in Stevens County—for instance, near Colville and Chewelah."

The references and map for Washington show numerous occurrences, none of which, however, falls within the indicated townships. Mr. Frost's letter states that the nearest deposit is six miles away.

Upon the documents, maps, and letters of counsel, I think it should be found that no part of the selected lands have coal or iron.

That "agricultural" means "nonmineral" in the present situation is ruled elsewhere. Nonmineral character, except as to coal and iron, now separately ascertained, was automatically established when the patents were issued upon general losses.

Without further summary, I conclude that the railway's request for substitution should be granted.

919

IX

AVAILABILITY OF WITHDRAWN LANDS FOR INDEMNITY SELECTIONS

Rulings upon other points have established the amount of the deficiency, the character of lands which might be available as indemnity, the status of certain particular areas, and the adaptability of certain of the losses. Yet, as I have indicated, substantially all of the lands in dispute are locked up in the national forests and other government reservations.

The lands are within the indemnity limits of the grant, but not having been then selected by the company as indemnity, they were included within various withdrawals. The withdrawals were made, pursuant to statutes, by order of the Secretary of the Interior, Presidential proclamation or executive order, and, in a few instances, by order of the Federal Power Commission. The purposes were principally for national forests though also, to a much smaller extent, for military reservations, Indian reservations, reclamation, power sites, stock drives, irrigation, bird reservations, game preserves, petroleum reserves, flowage, and administrative purposes. In some instances the withdrawals were by specific description, but usually by designation of boundaries. It may be taken as a matter of common knowledge, and is indicated by the testimony of the foresters, that the forest reserves, which constitute the great bulk of the withdrawn lands, include within their boundaries greater or less quantities of privately owned land, interspersed over the areas. In fact, many of the forests include indemnity lands patented to the railway before the reserves were created.

The areas of the odd-numbered withdrawn sections in the different indemnity belts in the several states, with the date and purpose of each withdrawal, and the number of plaintiff's exhibit pertaining thereto, are as follows:

920 GRANT OF 1864

SECOND INDEMNITY LIMITS

WISCONSIN

Govt. Ex.	Date	Purpose	Acres
110	Mar. 15, 1921	Power	40.00

MINNESOTA

111	Jan. 13, 1906	War	.63

MONTANA

112	Feb. 3, 1892	Forest	5,126.00
113	Mar. 1, 1898	"	279,539.83
114	July 14, 1899	"	4,004.38
115	Mar. 19, 1900	Indian	34,088.61
116	Dec. 18, 1901	Forest	27,828.00
117	Aug. 16, 1902	"	102,517.79
118	Aug. 24, 1903	Reclamation	452.90
119	Oct. 31, 1903	Forest	917.80
120	Jan. 29, 1904	"	19,520.00
121	May 12, 1904	"	41,183.35
122	Sept. 20, 1904	Reclamation	3,109.50
123	Oct. 3, 1905	Forest	42,252.01
124	Jan. 11, 1906	"	1,038.79
125	Apr. 12, 1906	"	1,473.43

SECOND INDEMNITY LIMITS—continued

MONTANA—continued

Govt. Ex.	Date	Purpose	Acres
126	June 2, 1906	"	4,046.05
127	Sept. 17, 1906	"	498.08
128	Sept. 18, 1906	"	11,163.14
129	Oct. 9, 1906	"	1,825.56
130	Nov. 5, 1906	"	75,785.79
131	Nov. 6, 1906	"	4,028.94
132	Mar. 2, 1907	"	80,573.50
133	Apr. 19, 1912	Power Site	1,117.02
134	Mar. 18, 1918	Stock Drive	2,305.64
135	July 1, 1921	Power	93.55
			714,409.72

IDAHO

136	Mar. 1, 1898	Forest	163,280.00
137	Mar. 21, 1905	"	83,653.38
138	Nov. 6, 1906	"	520.16
139	Dec. 11, 1906	"	3,484.00
140	Mar. 2, 1907	"	160.00
141	May 25, 1915	Irrigation	40.00
			251,137.54
		Total withdrawn, second Indemnity Limits	965,638.89

921

FIRST INDEMNITY LIMITS

MINNESOTA

142	May 14, 1915	Bird Res	0.27
143	Oct. 13, 1920	" "	.33
			.60

MONTANA

144	Mar. 1, 1898	Forest	294,395.36
145	July 14, 1892	"	3,902.60
146	Mar. 19, 1900	Indian	17,962.32
147	Dec. 18, 1901	Forest	37,512.96
148	Sept. 4, 1902	"	4,152.20
149	Oct. 21, 1903	"	8,600.53
150	Jan. 29, 1904	"	43,533.72
151	Feb. 12, 1904	"	5,471.51
152	May 12, 1904	"	73,550.31
152A	July 14, 1899	"	320.78
153	Oct. 3, 1905	"	6,949.45
154	Jan. 11, 1906	"	2,254.32
155	Mar. 7, 1906	"	520.00
156	Apr. 12, 1906	"	12,893.24
157	June 2, 1906	"	10,476.19
158	Sept. 17, 1906	"	3,394.00
159	Sept. 18, 1906	"	9,601.00
160	Oct. 9, 1906	"	320.00
161	Nov. 5, 1906	"	7,[illegible]88.24
161A	Nov. 6, 1906	"	4,682.17
162	Mar. 2, 1907	"	30,355.65
163	June 22, 1909	Power	40.92
164	Apr. 16, 1917	Game Pres	778.04
165	Mar. 18, 1918	Stock Dri[illegible]	259.56
			579,911.00

FIRST INDEMNITY LIMITS—continued

WYOMING

Govt. Rx	Date	Purpose	Acres
166	May 22, 1902	Forest	93, 860. 00
167	Jan. 20, 1903	"	18, 807. 99
168	Apr. 25, 1903	Reclamation	1, 080. 79
169	June 8, 1904	"	9, 006. 04
170	Dec. 6, 1915	Petroleum	860. 00
			80, 617. 82

IDAHO

171	Mar. 1, 1908	Forest	114, 276. 55
172	Dec. 18, 1901	"	615. 00
173	Mar. 21, 1903	"	141, 949. 72
174	Jan. 18, 1906	"	784. 08
175	Dec. 11, 1906	"	1, 777. 77
176	Apr. 21, 1910	"	160. 00
177	Jan. 13, 1914	Power site	120. 00
			260, 579. 09

WASHINGTON

178	Mar. 1, 1908	Forest	72, 543. 80
179	Dec. 18, 1902	"	85, 193. 35
180	Apr. 28, 1906	"	1, 360. 00
181	July 26, 1906	"	80, 830. 07
182	Aug. 23, 1906	"	5, 009. 68
183	Mar. 2, 1907	"	1, 172. 52
184	Sept. 17, 1909	Power	383. 79
184A	Feb. 1, 1921	"	133. 20
184A A.	May 18, 1924	"	92. 74
184B	Aug. 22, 1924	Reclamation	40. 00
			107, 339. 24
		Total withdrawn, First Indemnity Limits	1, 088, 604. 75

MINERAL INDEMNITY LIMITS

WISCONSIN

110A	Dec. 2, 1920	F. P. Project	40. 00

MINNESOTA

111A	Oct. 24, 1901	Flowage	57. 28
111B	Mar. 22, 1905	"	83. 00
			140. 28

MONTANA

183	Sept. 4, 1902	Forest	304, 331. 14
186	May 4, 1904	"	9, 565. 47
187	Nov. 3, 1906	"	240. 00
188			
188A	Aug. 9, 1909	Power	299. 71
188B	Nov. 23, 1914	Admin.	34. 42
188C	Dec. 6, 1915	Petroleum	73. 32
			314, 544. 06
		Total withdrawn, Mineral Idemnity Limits	314, 734. 31
		Total withdrawn, Grant of 1864	2, 369, 627. 93

[1] See note on Exhibit.

The apparent total, as thus shown, is 2,369,027.95 acres. In Idaho, however, within the rule that the company may select lands in second indemnity only to the extent of its subsequent losses, about 30,080 acres of nonmineral withdrawn lands
923 are beyond reach. Also, as held, 3,300.82 acres of Fort Ellis lands are closed to selection. Finally, 92,276.70 acres of the withdrawn lands are conceded to be mineral and are hence ineligible. These deductions bring the total down to about 2,244,000 acres. By comparing the net total with the ascertained deficiency of 2,220,224.17 acres, it will be seen, assuming that the unindemnified losses making up the deficiency are all such as may be applied to the lands in question, there are just barely enough to make up the deficiency. It may also be noted that the deduction of the inadmissible lands just specified so reduces the indemnity areas that even after having diminished the unsatisfied losses by the quantity of the Portage conflict there is little, if any, surplus. Thus, practically, the Portage question becomes moot.

To what extent, if any, resort may be had to the withdrawn lands to satisfy the acknowledged losses is now the question. This brings us squarely to the Forest Reserve case, United States v. Northern Pacific Railway Company, 256 U. S. 51, which is both the occasion and the guide for the present adjustment.

There the court put as the test of the validity of a withdrawal for governmental purposes, whether at the time of the withdrawal "the lands available as indemnity" were "sufficient to supply the losses."

If the decision in the Forest Reserve case did not preclude it, strong reason would appear to exist for the position that the right of selection was a valuable right which the Government could not infringe by any withdrawals in the indemnity limits without the consent of the railroad, even though sufficient
924 acres were left to match the deficiency. If the government might withdraw any lands, it might withdraw the best, so that in effect it, instead of the company, would be doing the selecting. By that view all of the withdrawals in any case would be totally ineffective. The argument is thus put in United States v. Colton Marble & Lime Company, 146 U. S. 615, 618, where a subsequent grant of place lands to the Southern Pacific overlapped the indemnity limits of the Atlantic & Pacific:

"Suppose, for instance, it should turn out that only half of the indemnity lands were necessary to make good the deficiency and that one-half of such lands were well watered and valuable while the remainder were arid and comparatively valueless, obviously

the right of selection would be seriously impaired if it were limited to only the arid and valueless tracts. In fact, every withdrawal of lands from the aggregate of those from which selection could be made would more or less impair the value of the right of selection. * * * being within the granted limits of the Southern Pacific, all its rights thereto vested at once, at the time of the filing of the map of definite location, and were not and could not be added to after that time; everything it could have in those lands it had then, and at that time there was an existing prospective right on the part of the Atlantic and Pacific Company to make a selection. That prospective right would be impaired by the transfer of the title of a single tract to the Southern Pacific."

See also Payne v. Central Pacific Ry. Co., 255 U. S. 228, 236, decided six weeks prior to the Forest Reserve case, and quoted above, where the granting act was similar to the Act of 1864, and where the court emphasized that the ultimate obligation of the government in respect of the indemnity lands was on the same plane as that respecting the lands in place. This view, as presented by the company on the authorities noted, appeared to me during the argument as of considerable weight.

Should it be thought that all reservations would be ineffective as against the company's right to "select", it would be
925 necessary to consider a possible distinction as respects second indemnity limits. The act provided that in lieu of general losses, other lands should be "selected" by the company. It also provided that indemnity for mineral losses should be "selected". The resolution, however, provided that for subsequent losses the company should be entitled to "receive" other lands under the direction of the secretary. I should be inclined to hold that the company had the same right to select within second indemnity limits as within first and mineral, and the Land Office has made no distinction in practice.

The railway contends that the decision in the Forest Reserve case does not preclude what might be called the theory of the inviolability of the indemnity limits. But I am now thoroughly persuaded that if the Forest Reserve case does not preclude that view, the opinion of Mr. Justice Holmes in United States v. Southern Pacific Railroad Company, 223 U. S. 565, does. There it was held that the right to indemnity depends upon the state of the lands selected at the moment of choice, and that therefore the railway had the benefit of restorations procured by the government to the indemnity limits. Conversely, it must suffer by depletions of the indemnity limits at the hands of the government. Now the Forest Reserve case qualifies the converse of this sweeping principle by the condition that the government may

deplete for its own purposes only so long as it leaves a sufficient quantity in the indemnity limits to meet the unsatisfied losses in the place limits. Thus the grant of indemnity may become in the last stage a grant of quantity and not of quality. I am firmly of
926 the opinion that the Forest Reserve case lays down the rule that the government may reserve or appropriate to its own uses lands in the indemnity limits so long, but only so long, as that which remains is sufficient to meet the unsatisfied losses. The rule does not have all the force of a judgment, because the case was remanded for a further hearing which was never had, the present suit resulting instead. I think, however, that the considered opinion of the court, though never effectuated by judgment, must be regarded by me as conclusive of the subject there under review. I think, moreover, that the court announced a rule which, in the light of the Southern Pacific case, just cited, is reasonable, judicious, and little less than inescapable. Again we must recall that the act is "a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress," Missouri, Kansas and Texas Railway Company v. Kansas Pacific Railway Company, 97 U. S. 491, 497, "illy as it may accord with common law notions," United States v. Southern Pacific Railway Company, 146 U. S. 570, 597.

Many of the plaintiff's exhibits, and much of its oral testimony, were devoted to presenting, alternatively, what counsel called the segregated and consolidated theories. By the segregated theory it sought to show when each of the several indemnity belts, and principally the second indemnity belt in each of the states, became insufficient to meet the losses which it assumed might be satisfied therein. By the consolidated theory it sought to ascertain when the indemnity limits, all taken together, became insufficient to meet the remaining unsatisfied losses, all taken together. Strangely, counsel say not a word in their brief upon these two alternative theories, though they request findings which suppose the applicability of the segregated theory. There
927 is, however, no longer room for the segregated theory. My rulings upon the use of prior losses in second indemnity and upon substitution lead to the treatment of all losses and lands together, for, in the last analysis, having held that prior losses may be used in second indemnity limits, and that mineral losses may be substituted for subsequent, it is as though all losses were equally flexible, and might be satisfied indiscriminately. This should be qualified by reference to my holding that losses in one state or territory may not be satisfied in the second indemnity belt in another. Moreover, the formula of the Forest Reserve case is to treat all losses and all lands together, and the case would be insoluble under any other interpretation.

The problem, therefore, is to determine when the grant became deficient, by comparing the unsatisfied losses with the indemnity lands which, but for their withdrawal, would have been available. Under the Forest Reserve rule, all withdrawals which, on being made, would yet leave enough land to meet the unsatisfied losses, were valid; all which, on being made, would leave less than enough, were invalid.

At this point the parties differ sharply. The United States contends that in computing the remaining lands, all vacant lands within the indemnity limits should be taken into account, including (a) lands subsequently ascertained to be mineral, and (b) lands unsurveyed. The company contends just the reverse.

As to mineral lands, it is indisputable that lands ascertained to be mineral were of that character at the time the grant took effect, and under the Barden case, were never obtainable. It matters not that in the Barden case the lands were in place. Isn't it obvious to every understanding that lands mineral in 1895–
928 1905 had been mineral from that day when Nature raised up the mountains and put the metals there—just as much in indemnity limits as in place?

As to lands unsurveyed, Mr. Frost cites certain decisions establishing the doctrine that "a survey of public lands does not ascertain boundaries; it creates them." When the grant was made, the vast region from the Missouri River to the Pacific Coast was practically unsurveyed. Now, the provision for indemnity was that whenever any of the granted sections or parts of sections should have been disposed of, other lands should be selected "in alternate sections, and designated by odd numbers." Until alternate sections had been established and designated by odd numbers there could be no selection. It must have been presumed that in the course of orderly survey the boundaries of sections would be created, and that then, and then only, could the right of selection by any possibility attach. Hence the regulation of the Secretary, that only surveyed lands might be selected, was but an application of the principle laid down by the courts. The United States, in all its history, has never undertaken, except in special cases like the grant of place lands in aid of railroad construction, or the provision for mineral locations, to dispose of its unsurveyed public domain. It is true it permitted preemptioners and homesteaders to settle upon unsurveyed lands. That, however, created no vested interest in the settler, the government promising only that when the land was surveyed the settler should have the prior right.

The government seeks to distinguish between "lands available for indemnity" and "lands available for selection," insisting that lands were available for indemnity by reason of their lying

vacant in the indemnity limits, and were thus to be taken into account under the Forest Reserve rule, though not obtain-
929 able. I cannot acquiesce in the distinction. I cannot follow the reasoning which says to the company, "The lands are available, but you cannot get them." I think Mr. Frost is justified in saying in his brief that such a distinction is pure juggling with words. I therefore hold that the appropriations of land by the government to its own uses were valid as against the company's claim to indemnity whenever, and only whenever, at the time of the particular appropriation, sufficient vacant surveyed nonmineral lands remained in the indemnity limits, in the aggregate, to meet the aggregate of unsatisfied losses.

The United States, by its method of computation, Govt. exhibits 107, 108, and 109, revised, shows an excess in the indemnity limits until 1902 thus validating the large withdrawals of 1898. The company, however, in its exhibits 137, revised, by excluding mineral and unsurveyed lands shows the indemnity limits deficient over 5,000,000 acres just prior to March 1, 1898, thus invalidating the withdrawals of that date. I hold the company's method sound in theory and result.

I think I have not underestimated the responsibility resting upon me in this decision. On March 1, 1898, alone, 1,155,822.58 acres were withdrawn for national forests. By exclusion of unsurveyed and mineral lands from the calculation of available indemnity these withdrawals were invalid, whereas by inclusion they would have been valid. Lesser withdrawals during the next three or four years suffered the same fate. The issue involves, in all, close to one and one-half million acres.

The United States bases its contention upon three propositions, first, that it is the rule of the Forest Reserve case; second, that it is in harmony with the practice of the General Land Office, and third, that it was applied to the Santa Fe grant.
930 The Forest Reserve case states the applicable rule (256 U. S. 51, 66):

"* * * it was not admissible for the Government to reserve or appropriate to its own uses lands in the indemnity limits required to supply losses in the place limits."

A more difficult question, says the court, is "whether it sufficiently appears from this record that the grant was deficient at the time of the temporary withdrawal; that is, that the lands available as indemnity were not then sufficient to supply the losses." Because the court said nothing about whether mineral lands or unsurveyed lands were to be counted as available, it is not to be supposed that it intended to say that they should be counted. Most certainly, not mineral lands; they were reserved to the United States, and hence were never available. They were excluded

before any computation could begin for calculating the lands required to supply the losses. The court was not called upon to say anything about them. The withdrawal under review was made January 29, 1904. At that time the mineral classification was nearing completion, and great quantities had already been classified as mineral and thus eliminated from possible consideration. The exclusion of them alone, still counting unsurveyed lands, would leave an excess just prior to March 1, 1898, of only about 140,000 acres.

Nor was the court called upon to say anything about unsurveyed lands. The stipulation quoted at page 62 of the opinion by its terms, excluded both mineral and unsurveyed lands:

"The plaintiff admits that when the withdrawal order of January 29, 1904, was issued, the lands patented to the defendant or its predecessor in interest within the primary and all indemnity limits, plus all other lands within the primary or place limits, not patented, but which passed under the grant, and also
931 all odd-numbered sections in all indemnity limits which the defendant was entitled to select under the regulations of the land department did not equal the sum total of all the odd-numbered sections lying within the primary or place limits of the grant, and this condition still obtains * * *."

The only reason the case was not decided upon the stipulation was that the government did not admit that the correct measure of the grant was the aggregate area of all the odd-numbered sections in the primary or place limits.

It is thus apparent the court was dealing only with lands which the company was entitled to select; and as neither mineral land nor unsurveyed land was open to selection it is certain they were excluded in declaring the doctrine of the case. But even without this perfectly obvious consideration, the logic and the whole theory of the case rests upon the assumption that the lands which were left could be gotten by the company. It is neither good sense nor good logic to say that they were available to the company either potentially or otherwise when they could not have been obtained.

The argument that plaintiff's position is in harmony with the practice of the General Land Office is met by the fact that its habit was to recognize all depletions by the United States as valid—condemned by the court in the Forest Reserve case.

Finally, the ruling of the Department of the Interior March 22, 1932, in the case of Atlantic and Pacific R. R. Co. (Santa Fe Pacific Ry. Co.) a photostatic copy of which has been supplied, cites as authority the Department's own ruling in the present case, and adheres to that ruling. It interprets the

Forest Reserve case in accordance with the interpretation now urged by counsel, making the same distinction as between lands available for indemnity and lands available for selection.

932 So it all comes around again to the meaning of the Forest Reserve case. I cannot accept either as precedent or persuasive authority the interpretation put upon it by the Department. This court must determine for itself what the Forest Reserve case establishes, and that determination cannot be aided by any effort of the Department to maintain its own previous ruling and to make the Forest Reserve case justify it.

The company's exhibit was prepared upon the supposition that the lands east of Duluth in conflict with the Portage road, found to be 347,141.24 acres, were proper base for indemnity selections, and without reference to the Montana place error of 5,435.46 acres; but the rulings adverse to it upon these points do not convert the deficiency into an excess March 1, 1898, so as to justify any part of the withdrawals of that date, the deficiency prior to those withdrawals having been, as stated, over 5,000,000 acres.

The company did not attempt to show the status of the grant at any date earlier than March 1, 1898. During the introduction of testimony its counsel stated that it would let the withdrawal of 5,120 acres in 1892 go, unless it were able to make a purely legal argument with respect to it. None was made except the argument that the United States had no right to invade the indemnity limits under any circumstances, which I have rejected. I must, therefore, consider that withdrawal valid.

In applying the term invalid, or any similar expression, to the action of the government in erecting the forest reserves, or in making withdrawals for other purposes, it should not be implied that there was anything reprehensible about it. Most of the withdrawals were made before the extensive losses and

933 depletions had been established by the mineral classification. Doubtless the government miscalculated the mineral as seriously as did the railway. But more particularly, the government had no special designs on the odd-numbered indemnity sections. It was withdrawing huge areas into which the indemnity sections happened to fall. Should the company have been permitted to select and sell them, the boundaries of the forests would have still remained, and the conservation policy of the government would not have been frustrated, though I do not question the wisdom of the act of 1929 in taking the company's selection rights by eminent domain, which, in substance, is what it does.

Coming down to the present time, the deficiency now, as found, is 2,220,224.17 acres. The total in the forests and other govern-

ment reservations, deducting surplus Idaho second indemnity, Fort Ellis, and conceded minerals as computed above, is about 2,246,000 acres. Thus the deficiency of 5,000,000 acres in 1898 has become an excess of perhaps 24,000 in 1937. This has resulted from the progress of survey and selection, by redetermination as to mineral character, by corrections of the place limits, by restorations to the indemnity limits; in short, by a variety of diminutions of, and charges to, the grant and by net enlargements of the selectable land in the indemnity limits from whatever cause. The small excess which may now perhaps exist validates to that extent the appropriations by the government. Though it may retain this quantity, the right of selection is with the company. The withdrawals having been invalid, the occurrence, subsequently, of an excess, would not legalize any particular withdrawal. If any, the first in point of time; but I do not see how it would be possible for me to make any
934 distinctions from among the large simultaneous withdrawals on March 1, 1898. I hold that all withdrawals except that of 1892 having been illegal in the first instance, the company, with that exception, may make its selections out of all the withdrawn lands to the extent of the deficiency as found, subject to these minor qualifications:

(a) The Fort Ellis restored lands are excluded from selection;

(b) In Idaho second indemnity the company may not make selections in the aggregate, including those heretofore made in that belt, in excess of its subsequent losses in Idaho. The first withdrawal therefrom having been for 163,280 acres en masse, it is my opinion, upon the same principle that forbids discriminations between the simultaneous withdrawals from the grant at large, that the right of selection is with the railway.

(c) Lands conceded to be mineral may not be selected.

The government, insisting that other base be supplied in support of selections now resting upon the Portage base, has not made an issue concerning the character of losses thus required. Similarly as to lands, generally, patented in error. It is obvious, particularly, that, within the terms of the granting act, no losses are applicable to the lands beyond the sixty-mile limit in Idaho and Montana, erroneously patented, though, by concession, they have been charged to the grant. My rulings have made the several sorts of losses, in practical effect, interchangeable, and have dispensed with tract-for-tract assignment. The very necessities of the cases appear to require these things, the problem becoming one not of supplying the losses, but of satisfying the deficiency.

935 There remains a somewhat puzzling difficulty to which counsel have given no attention either in testimony or

argument. Much of the land in these forest reserves is unsurveyed, and the practical difficulty of selecting is apparent. I have concluded, however, rather than to delay this report further, that the detail of selection may be left open to a subsequent hearing. The decree now to be entered is in its nature, and I suppose will be in form, interlocutory, under the provisions of the bill to supplement the act of June 25, 1929. With my present light upon the subject, I should be inclined to hold that a protraction of the survey of the lands as yet unsurveyed should be made and the selections based thereon. The excess at present is so small—about 24,000 acres out of 2,244,000—as to bring the case almost within the rule of the Land Office and the courts, that no selection is necessary when all the lands are required to satisfy the deficiency. All are appropriated. St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U. S. 1, 19; United States v. Colton Marble & Lime Company, 146 U. S. 615, 616; 25 L. D. 511. Identification upon the ground for purposes of valuation would still be necessary, but beyond that there would be no problem of selection. I anticipate, should the principles of any conclusions concerning these unsurveyed lands be sustained, counsel will have no difficulty in stipulating a method of selection.

What I have said just above is in view of the provisions of the act of June 25, 1929. Although the language is somewhat contradictory, I feel convinced that by that act it was intended that a final decree should be made in this case of the land grants to the Northern Pacific, and while it is true, as I think and have held, that unsurveyed lands could not be selected in course
936 of regular administration of the grant, yet that difficulty should not stand in the way of making the selections here referred to. The government has placed the lands in reservations, and has declared its intention to keep them. They could, therefore, never be available to the company, and it seems to me that it makes but little difference at this time whether they are surveyed or unsurveyed. The railroad being entitled to receive them whenever they were surveyed, I think the principle that equity regards that as done which ought to be done should apply; and the lands will now be treated as surveyed. The only thing necessary for the purpose of selection and subsequent valuation is identification, and that may be had for all practical purposes as well by protraction as by actual survey.

This concludes the discussion of the grant of 1864. I have endeavored to rule upon some minor points which were not discussed in the briefs, but which seemed to be necessarily involved. I have refrained from reference to many points of detail upon which I think the parties to be in agreement, or which will be

determined by general principles which I have stated. It has been my purpose to make this report sufficiently comprehensive to afford a basis for the selection by the company of the specific lands for which it is entitled to compensation, and for the quieting in plaintiff of such as remain. The parties will best know to what extent the selection lists now on file as exhibits are suitable as final descriptions, and in what manner, and when they should be amended to comply with the final decree. I do not consider a tract-for-tract specification of losses necessary, but think the quantity by which the grant is found deficient may be selected from the areas designated, subject to the qualification stated.

937 GRANT OF MAY 31, 1870

I

THE GRANT

The act of 1864 authorized the Northern Pacific to construct a line

"to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus";

The Joint Resolution of 1870 authorized it

"to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound";

The resolution thus designated as a branch the portion of the road across the Cascades, formerly part of the main line, designated as part of the main line the route down the Columbia formerly called a branch, and continued the main line down the Columbia to some point on Puget Sound.

Maps of definite location of the portion of the main line from Kalama north to Tacoma were filed in 1873 and 1874, and for the portion from Kalama south to Portland in 1882, and the road thus located was constructed. The part of the projected main line between Pasco and Portland was not definitely located or constructed, and the grant pertaining to it was forfeited by the act of September 29, 1890, 26 Stat. 496. Maps of definite location of the branch from Pasco to Tacoma were filed in 1883 and 1884. Since under both the act and the resolution the terminus of the main line was at Puget Sound, the net result of all this

was that physically and legally the Pasco-Tacoma route
938 became part of the main line, and the Tacoma-Portland route a branch.

At first blush the simple reference to the privileges, grants, and duties of the 1864 act seems to constitute a rather slender expression of an intent to grant lands in aid of the extension from Portland to Tacoma. That such was the purpose and effect, however, is easily discernible in the debates, and, moreover, is shown by comparison with the joint resolution of April 10, 1869, 16 Stat. 57, granting to the Northern Pacific a right of way to build this very line, but providing that the company should not be entitled to any subsidy in money, bonds, or additional lands in respect of such extension. While there is no doubt of the intent, it may be observed that United States v. Northern Pacific Railroad Company, 193 U. S. 1, to which I shall hereafter refer, recognizes it. A precedent for the incorporation of a grant by reference to an earlier grant may be found in the statutes involved in United States v. Southern Pacific Railroad Company, 146 U. S. 570, where a grant to the Southern Pacific for an additional line was made by reference to a previous grant to the same company for another line. By reference to the 1864 act, therefore, Congress granted to the company, in aid of the portion of the extended line from Portland to Puget Sound, the odd-numbered sections in a quadrilateral twenty miles on each side of that line in the State of Oregon and a quadrilateral forty miles on each side in the Territory of Washington, with a ten mile indemnity belt for general losses and a fifty mile indemnity belt, measured from the line of the road; for mineral losses.

As appears in the discussion of the 1864 grant, the joint resolution of 1870 provided a second indemnity belt for satisfaction of losses to the amount suffered subsequent to July 2, 1864,
939 in any state or territory where the first indemnity belt was insufficient to meet the losses at date of final location in the particular state or territory. Should that apply to the newly subsidized extension from Portland to Tacoma? Plaintiff urges that it should not; that Congress intended to provide second indemnity only to take care of situations where, in the interval between 1864 and 1870, settlers had gone in and depleted the limits originally prescribed. There would be great force in the argument if it were not that the resolution plainly provides otherwise. The second indemnity provision is set out in full at page 2 of this report. The phrase "said main line" where it twice occurs, refers back, both grammatically and logically, to the "main road to some point on Puget Sound, via

the valley of the Columbia River." No distinction is made between the old main line and the new. It therefore seems clear that the resolution authorized second indemnity opposite the new line, provided, of course, the lands in first indemnity, at the time of final location in the particular state or territory, Oregon or Washington, were insufficient to supply the losses.

The United States refers at length to the debates in the Senate and House to show that the purpose of the new belt was to provide indemnity for losses opposite only the 1864 line. Recent decisions appear to authorize resort to the debates to ascertain intent, with increased liberality, but, still where, as here, the language is unambiguous, there is no excuse for going outside the terms of the statute itself.

The Commissioner was so instructed by First Assistant Secretary Pierce in Northern Pacific Railway Company (Nov. 24, 1908), 37 L. D. 272. Plaintiff claims that the Assistant Secretary's opinion is obiter. Supposing so, I reach the same conclusion independently of it.

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II

TACOMA OVERLAP

The line from Portland and the branch over the Cascades, as located and constructed, met at Tacoma at practically right angles, thereby creating a quadrant southeast of Tacoma, in which the 1870 grant is said to overlap the earlier, hence the "Tacoma Overlap", which presents the major question in the 1870 grant. N. P. exhibit 142, or, more conveniently, the small sketch accompanying it, shows the situation.

Two fundamental principles established by the courts as between senior and junior grants to different companies should be stated. First, when the senior grantee definitely locates its line, the lands within the place limits as thus determined pass to that grantee by relation as of the date of the grant. So, likewise, in the case of the junior grantee, its definite location relates back to the date of its grant. It therefore follows that the senior grant takes the land to the exclusion of the junior grant. This result is not at all affected by the respective dates of definite location. "Congress intends no scramble between companies for the grasping of titles by priority of location." Mr. Justice Brewer in United States v. Southern Pacific Railroad Company, 146 U. S. 570, 597–598. Second, if the junior grant should contain indemnity provisions such as those in both the Northern Pacific grants, then the lands within the overlap would be lost to the junior grantee, and it might have indemnity therefor.

Now the precise point to the Tacoma Overlap question is whether these principles apply in a senior and a junior grant to the same company, there being no explanatory or declaratory language in either grant upon the subject. In other words,
941 as a bare matter of interpretation of the language of the two grants, may the Northern Pacific, because of this overlap, claim a right to indemnity in behalf of the Portland-Tacoma road under the grant of 1870, because it got the lands for the Cascade route under the grant of 1864 and so could not get them again.

Counsel on each side cite certain cases claimed to require a determination of this question one way or the other. I shall, therefore, first examine those cases.

Judge Biggs puts in the forefront what are called the Barney cases, 6 Fed. 802; 113 U. S. 618; 24 Fed. 889; 117 U. S. 228. The facts as stated by the court are many and complicated. No good purpose would be served by restating them. So far as any question here is concerned, the substance of those cases is about as follows: Congress had made a grant to the territory of Minnesota to aid in the construction of a railroad running generally easterly and westerly. The benefit of that grant ultimately came to the Winona and St. Peter Railroad Company. By the same act it granted other lands for a road running northerly and southerly, which ultimately got into the hands of the Minnesota Central, crossing the Winona and St. Peter. Both lines were definitely located. The Winona and St. Peter was built to a point in each direction beyond the crossing, and I infer, but am not certain, that so was the Minnesota Central. By a subsequent act Congress granted to the state, for the benefit of these and other railroads, an additional four sections per mile, excepting certain lands, however, in these words (113 U. S. 621):

"That any lands which may have been granted to the Territory or State of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of lands hereby granted."

942 49½ miles of the Winona and St. Peter were constructed before the additional grant, 53 3/100 after. So far as of importance here the litigation turned on what was thus excepted from the grant. Mr. Justice Field, in writing the opinion on the first appeal, said (113 U. S. 628):

"The reservation of the lands previously granted to Minnesota from the grant of the additional four sections, that is, from the extension of the original grant of 1857, was only a legislative declaration of that which the law would have pronounced inde-

pendently of it. Previous grants of the same property would necessarily be excluded from subsequent ones."

I am not at all certain that I understand the Barney cases. Counsel on each side profess to know all about what they mean and what they hold, and will doubtless be able to aid Your Honor in understanding them. I should dislike very much, however, to base an opinion upon the Barney cases. As I gather, they declare the rule that where lands have been granted to one road, a subsequent grant to another road does not include the previously granted lands. This, of course, must be so; but the question remains, notwithstanding the previous grant, might not the second grant be so phrased as to provide that, because certain lands had been previously granted to another road, the road receiving the second grant might have indemnity on account of the loss? So far as I can make out, the cases throw no light whatever upon that subject, and, therefore, do not give much aid in reaching a conclusion as to the Tacoma Overlap.

United States v. Oregon and California Railroad Company, 164 U. S. 526, comes nearer to the mark, but still does not reach precisely the question. There a grant had been made which ultimately came into the hands of the Oregon and California. The grant was to aid the construction of a main line from Portland to Astoria, and of a branch line from a junction at or near Forest Grove on the main line southerly to the Yamhill River at McMinnville. Both main and branch lines were definitely located. The main line, however, was built only to a point near Forest Grove, and subsequently the remainder of the main line grant was forfeited. The branch from near Forest Grove to McMinnville was built. The suit was to quiet title to lands falling within the northwest quadrant at the junction between the located main line and the constructed branch. The court held the main line absorbed the grant within its place limits and that within those limits, therefore, the branch line received nothing. This is not a full statement of the case, but it seems to be sufficient for any purpose here. In the report is a plat illustrating the situation. While the grant contained an indemnity provision no claim was made under it. The single question was whether the place lands of the main line went to that road to the exclusion of the branch line. Now there are two features distinguishing that case from this. The first is that the grant was by a single act, and, therefore, had to be construed as a single grant, and the second, that no indemnity question was presented. Had the branch line admitted that it did not earn any place lands within the primary limits of the main line, and sought indemnity therefor, the question in that respect would have been

943

the same as here: While, therefore, this case is not controlling, it has a certain persuasive force. It recognizes the principle that Congress, by the general terms of the act, did not intend to make two grants of the same lands to the same company, holding that the lands within the overlap were absorbed by the main-line location and that the branch line got nothing within the conflict.

The Court of Appeals for this Circuit had held the con-
944 trary, but the judgment was reversed. The Supreme Court relied somewhat for its conclusion upon the doctrine of strict construction of governmental grants and quoted approvingly the following language from Mr. Justice Harlan in Sioux City & St. Paul Railroad Company v. United States, 159 U. S 349, 360:

"If the terms of an act of Congress, granting public lands, 'admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.' Leavenworth &c. Railroad v. United States, 92 U. S. 733, 740. Acts of this character must receive such construction 'as will carry out the intent of Congress, however difficult it might be to give the full effect to the language used if the grants were by instruments of private conveyance.' Winona & St. Peter Railroad v. Barney, 113 U. S. 618, 625. 'Nothing is better settled,' this court has said, 'than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion.' Lau Ow Bew v. United States, 144 U. S. 47, 59.

"Giving effect to these rules of statutory interpretation, we cannot suppose that congress intended that the railroad company should have the benefit of more lands than it earned."

Plaintiff insists that under the doctrine in pari materia the two grants to the Northern Pacific should be considered together as one grant. Of course, they must be construed with reference to one another, but neither the pari materia rule nor any other doctrine can obscure the fact that one grant was in 1864 and the other in 1870, and consideration of the two acts with reference to each other must keep that fact in view and given it whatever weight it may be entitled to under all the circumstances.

Mr. Frost put in evidence the record in the Forest Reserve case and claims that the measure of the grant of 1864, as stated by Mr. Justice Van Devanter, is res adjudicata. I must suppose that counsel has overlooked the circumstance that there
945 was no final judgment in the Forest Reserve case. There

had been a judgment in the lower court, which was reversed, and there the matter ended. Of course, there could be no adjudication without a judgment. To adjudicate is to adjudge. Counsel do not claim that it is res adjudicata as to the 1870 grant, but maintain rather that the principles, the rules, there announced govern the 1870 grant in precisely the same manner as that of 1864. Naturally, that is true insofar as the same question may arise under the two grants. The Tacoma Overlap, however, did not, and could not, come up in the 1864 grant, and there was no occasion for the court, therefore, to say anything about it. Indeed, I doubt if the Supreme Court had ever heard of the Tacoma Overlap. It is true that the Jones adjustment was in the record and that computation shows the lands within the overlap were excluded from the area of the 1870 grant; but no question about it was presented. In fact, there was no question anywhere about it, as I shall point out presently. The Supreme Court laid down rules for the admeasurement of the 1864 grant where there was no overlap, and therefore, of course, no overlap question. The overlap resulted from the grant of 1870 and must necessarily be taken into account in determining the measure of that grant. I am not overlooking the doctrine that the decision in the Forest Reserve case, and the grounds of it, became the law of the case in all subsequent steps taken therein. But this is a very different thing from the doctrine of res adjudicata. I think the Forest Reserve case has nothing to do with the Tacoma Overlap.

Defendant strongly insists upon the opinion of Secretary Noble in Chicago, St. Paul, Minneapolis & Omaha Railway Company (Oct. 11, 1889) 9 L. D. 483, 486. I do not understand the facts of that case. There is not enough stated in the opinion to
946 enable anyone to understand it. The point came up as one of many instructions to the Commissioner upon the adjustment of the grant to that road. To go back to the statutes and then have before me the record in the case, if that were possible, and to understand the adjustment of that grant so as to build up thence a conclusion as to what Mr. Noble meant by his decision, or by his language, or come to any clear comprehension of the case, would require as much labor as to decide the present question now; and to do this would extend the report beyond any permissible length. If Mr. Noble meant to say that by some recognized rule of construction the intention of Congress was plain, then I should have no quarrel whatever with his conclusion on the point. But he does not inform us how he arrives at the intention of Congress. He simply states it. If he meant to say by the declaration, no technical rules of law or adroit schemes

of adjustment should be permitted to calculate the beneficiaries of Congress out of the county intended for them," he had disregarded established rules of law in arriving at the intention of the legislature, then I should decline to follow him. He nowhere informs what technical rules of law he had in mind, nor what the adroit schemes of adjustment may have been. I feel bound to say as to this case, therefore, that I presume it was correctly decided on the facts before the Secretary, but that I have no possible means of knowing whether those facts are sufficiently like the facts in the Northern Pacific grants to justify the use of the opinion as a precedent. Nothing in the opinion lays down any general legal principles which might throw light upon the construction of the Northern Pacific grants. I, therefore, as I did with the Barney cases, lay it to one side.

947 United States v. Northern Pacific Railroad Company, 193 U. S. 1, is clear, intelligible, and easily understood. The court held that as the Northern Pacific had never definitely located its line down the Columbia to Portland, and as it had been forfeited nothing stood in the way of the grant of 1870 taking the land. The imaginary overlap had nothing to do with it. The whole case there turned on the question whether there was a conflict between the two grants. Counsel, recognizing this, constructed a theory that Nature definitely located the line down the Columbia, thus conveniently relieving the company of the necessity. The court rather curtly disposed of that theory and held, there having been no definite location for the earlier grant, there was no overlap.

So, also Northern Pacific Railway Co. v. De Lacey, 174 U. S. 622, declares only that the grant of 1864 conferred the land rights upon the branch over the Cascades, and that this grant was not superseded by the resolution of 1870. Had the branch over the Cascades never been definitely located or built to Tacoma, then there would have been no Tacoma Overlap, and undoubtedly the 1870 grant would have carried the land to the Northern Pacific, as it did at Portland. I should have no trouble, without those authorities, in holding the same thing; but obviously the question here is altogether a different one. The Cascade branch was built, the Portland line was built, and the two coming together at right angles created the overlap.

I have diligently sought to obtain some clue to the intention of Congress as to this question other than the language employed. I have not been able to find anything worth much.

The Congress in 1870, elected in 1868, was overwhelmingly in control of men who believed in extensive railroad building
948 and land grants to aid. Public opinion, however, upon

this question was rapidly changing. Already Congressmen doubtless heard the mutterings resulting in the Granger movement of the early 70s, which was largely responsible for the close election of 1876. There is discernible in the debates a strong, sometimes even a bitter, opposition to the grant of 1870. The question of an overlap in the two grants apparently never occurred to any one. Counsel have diligently gathered up the debates in both Houses over other features of the resolution, but have cited me to nothing on that phase. Mr. Davenport, examining the debates, is unable to find any reference whatever to the subject. This is strange, because, had the lines been built as authorized, an overlap was certain to occur at or near Portland, and there might, indeed probably would be, one at Puget Sound, depending upon whether the termini of the Cascade branch and the Portland-Tacoma line should be fixed at the same point. It seems almost certain, had it entered the mind of any debater, that this question might come up, and that it might be claimed that there was a double grant, both at the point near Portland and at the common terminus of the two roads on Puget Sound, the opposition would have stressed it. It is difficult for me to comprehend how it could have been overlooked. It can be accounted for only in one of two ways—either that no one in Congress, at least no one of the minority, ever thought of the question; or else that no one supposed the contention now put forward by the company could ever be made; in other words, the opposition must have supposed that the frame of the resolution did not by any possibility permit a construction allowing a double grant at the two points of junction. Any inference drawn from this circumstance is so indefinite and uncertain that I should not care
949 to rely upon it as showing congressional intent. I only mention it in passing as a rather curious circumstance of uncertain bearing.

So I feel bound to come to a decision upon principle, as I find no authorities which serve as a precedent, nor other clue. We are left without any aid except the language employed, and, after all, the old-time rule of taking the language as it stands and interpreting it is the safest guide.

One is likely to be misled by the phrase often used in the testimony, "lost to the grant". One gets an impression from the use of that term that "lost to the grant" refers to the loss without reference to the grantee. What that phrase means is that when lands within the place limits intended for the grantee by the granting act could not be obtained by it because of certain reasons stated in the act, the grantee had lost them. The phrase "lost to the grant" is purely a bookkeeper's term, intended

to express this legal conception. Frequently, too, the phrase "lost to settlers" is used, meaning, of course, lost to the grantee because of settlement. Of course, where the grants are to different companies this construction is without importance; but here, where both grants are to the same company, it may have some bearing.

As noted above, the grant of 1870 was in these words:

"To locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation * * *"

Of this clause two things are to be noted. The first is, in the language of Mr. Justice Brewer in United States v. Southern Pacific Railroad Company, 146 U.S. 570, 595:

"It matters not that the act of 1871 in terms purports to bestow the same rights, grants, and privileges as were granted to the Southern Pacific Railroad Company by the act of 1866. That merely defines the extent of the grant and the character of
950 the rights and privileges; it does not operate to make the latter grant take effect by relation as of the date of the prior grant, and thus subject the grants to the two companies to the rule controlling contemporaneous grants * * *"

In the next place, the clause does not undertake to include in the grant of 1870 any words or phrases from the grant of 1864. It merely confers the same privileges and grants, and imposes the same duties, as were conferred and imposed in the act. Whatever was conferred or imposed in the parent grant, as determined by the court where necessary, was transferred in exactly the same sense and to the same effect to the junior grant. It is as though the resolution in this respect had been a part of the grant of Section 3 of the act of 1864. It, to my mind, therefore, is perfectly obvious that, when we have determined the significance and effect of the original grant, we have determined the meaning and effect of the supplementary grant in the joint resolution.

By the act of 1864 indemnity was provided "whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of * * *"

The term "shall have been granted" obviously means granted to somebody other than the Northern Pacific. So the term "or otherwise disposed of" refers to a disposition to some person other than the Northern Pacific. There was no Northern Pacific until the act making the grant created it. Therefore it cannot be disputed that the phrase means what I have just said. This aside, however, the whole construction and intent of this indemnity provision is just this and nothing more: "We have

granted you, the Northern Pacific," say the United States, "certain lands, but we do not know, by the time you make definite location of your line, whether those lands will be available
951 or not. Homesteaders and preemptioners may have taken some of it; we may have reserved some portion; we may have granted some portion, or in some other way have disposed of it, so that you can not obtain it, therefore, you may have indemnity in lieu of the lands that you have thus lost."

So when the joint resolution was passed, the United States was made to say to the Northern Pacific, as to the Portland-Tacoma line, precisely the same thing it had said in the act of 1864, no other or different. I repeat, the resolution did not adopt the language of the act. It adopted the result, the legal effect of that language. To put it another way, whatever resulted from the granting and indemnity provisions of the act of 1864 likewise resulted from the grant of 1870, no more, no less, no other, and no different. I cannot comprehend reasoning by which it is sought to be maintained that when the privileges, grants, and duties of the act of 1864 were applied to the new road they took on any new, or additional, or different sense. If I am right, then it follows, of course, that the terms "shall have been granted * * * or otherwise disposed of" mean just what they meant in the Act of 1864, no more, no less, and therefore they do not, and cannot by any possibility, include a previous grant to the Northern Pacific or a previous disposition to the Northern Pacific.

The argument of counsel for the company comes just to this, that because the government had already granted these lands to the Northern Pacific, they should be treated as "shall have been granted" in the joint resolution of 1870, although not possibly so to be interpreted in the Act of 1864; and because the Northern Pacific did not get them a second time, it should have indemnity for them now. Certainly, Congress might have so phrased the resolution of 1870 as to make it mean that, but it is to my
952 mind so clear that they did not do so that argument will add nothing to the conclusion. What, obviously, Congress meant to say by the joint resolution is, "If you will build this line from Portland to Tacoma, we will make you a grant of land in the same quantity per mile and on the same terms and conditions we have already granted you by the act of 1864, but if by reservation or grant to some third person or through settlement under the land laws of the United States, you do not get that land, you may have indemnity therefor." The most latitudinary construction even could not make out of the language employed anything more. The United States said to the Northern Pacific, "If you will build this line, we will grant you this land; we

will give you indemnity for losses along the line to third persons; but, likewise, if by the location of your line across the Cascades you already get it, we will not give you indemnity because you did not get it a second time."

It is unnecessary in the view I take of this question to invoke the doctrine of strict construction. The most liberal rule would not carry the grant, as claimed, to the company; but most assuredly it cannot be reasonably insisted that there is not a great and besetting doubt as to whether the result claimed was intended by Congress.

"If the terms * * * 'admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor.'"

No reasonable, I might say no possible, argument can be made that the claim under the joint resolution does not come squarely in letter and spirit within the quoted language.

The views expressed above receive strong confirmation from the action both of the Interior Department and of the
953 company with respect to the lands in this overlap. In the Jones adjustment of 1906 the lands were excluded from the grant of the joint resolution. In the tentative adjustment (Govt. exhibit 66) transmitted to the Attorney General, the forester and the company, December 19, 1923, the overlap area is not deducted from the measure of the grant. Following the forester's brief the area was deducted and the deduction is shown in the Commissioner's report to the Joint Committee of Congress. In all subsequent action or opinion by the Department, the deduction has been maintained. There is no proof before me that the company made any objection until the hearings before the Joint Committee of Congress. There is no evidence that at any time before those hearings it put forward any claim to be entitled to have indemnity for the lands within the overlap. When the Cascade branch was located in 1884, the state of the grant under the joint resolution was fixed. If indemnity might be had for these lands as now claimed, the grant was deficient, and a second indemnity belt should have been laid down. If, on the other hand, indemnity could not be had, then there was no deficiency authorizing second indemnity limits. Apparently neither the government nor the company ever thought of laying down a second indemnity belt until 1906. There is no proof that the company asked for one and no proof that the government ever considered it. Explanations are offered as to how it came to be done in 1906. The Jones adjustment prepared in that year indicated a deficiency in the state of Washington under the grant of 1870, and counsel for the government surmise that

the Land Office thereupon erroneously laid down the second indemnity limits for that state without considering that the authority for it should have been governed by the status of the grant, not at the time of the adjustment, but at the date of
954 final location. Counsel for the railway surmise, likewise, that the Land Office laid down the limits because it considered the Tacoma Overlap a loss, and hence that the grant was deficient at final location. I do not know if either explanation is correct, but somehow or other the second indemnity belt was laid down in the state in 1906.

Now, as already said, the company became entitled to indemnity in this overlap, if ever, upon the final location of the Cascade branch, and yet from that time forward it has never tendered as a loss to the 1870 grant any of the lands within the overlap. It never sought in any way to obtain indemnity for these lands or any of them, though during that whole period there were surveyed fee lands in first indemnity, and afterwards in second indemnity, available for selection for such loss. It cannot be said, either, that this was an oversight. Some 30,000 acres of overlap lands were lost to settlers. Indemnity selections were promptly made for the lands so lost, the selections being in the indemnity limits of the grant of 1864 for all but 1,792 acres, which were selected in the indemnity limits of the 1870 grant or indemnity limits common to both grants; and all of that except 40 acres was selected at a time when the two grants were not being administered separately, and, as indicated, even the 40 acres was lost to settlers. Not an acre was tendered as base for indemnity by reason of having been taken by the prior grant.

It is impossible for me to believe that, had the Northern Pacific supposed it was entitled to indemnity for these lands because of the prior grant, that is, entitled to get twice as much land because of the two roads, as it had gotten by the one road, it would have laid by through all these years and never asserted the right. It is conduct that would be inexplicable if ap-
955 plied to anyone else, if applied to a private citizen, I should say, or any other sort of a corporation; it is doubly inexplicable when applied to this defendant, because throughout its long career it hastened, sometimes precipitately and to its own disadvantage, to make lieu selections. Even in this overlap it tendered for indemnity every acre taken by settlers as base under one grant or the other, but not one acre did it tender as lost to the junior grant by reason of belonging to the senior.

Mr. Frost asserts that there was no occasion to tender overlap losses, as there was always an abundance of losses from other claims to take up such indemnity land as was from time to time

available. He, of course, was not counsel during that period, and what he offers as explanation is only his present best theory upon the subject. It is possible to suppose that it may have so happened, but it is so improbable as to put the supposition beyond the bounds of reasonable inference. I think the true explanation is the apparent one—that through all those years the company was not claiming this indemnity.

I conclude, therefore, upon consideration of all that bears on the subject, that the lands within the Tacoma Overlap cannot be regarded as "lost," and that in consequence indemnity may not be had for them.

III

MINOR QUESTIONS

8,568.29 acres were selected in the indemnity limits under lieu or relief acts. I held under the 1864 grant that the company should not be charged, or as it says, charged a second time for such selections. The same ruling applies here, of course.

956 80 acres of unsurveyed lands lie in first indemnity, outside reserves. I hold this should be charged for the purpose of the adjustment, and ultimately patented.

IV

SUBSTITUTION OF LOSSES

As a result of my conclusion upon the overlap, there was no deficiency in the state of Washington at the date of the railway's last definite location. That is, at that date there were in the place and first indemnity limits in Washington, unappropriated, "the amount of lands per mile granted by Congress within the limits prescribed by its charter." Hence the condition did not happen for laying down second-indemnity limits in that state, and no occasion for sustitution exists. Even should I be in error on the overlap, so that second indemnity is proper, still, strictly, there is no need of substitution, for there is vacant mineral indemnity to meet the unsatisfied mineral losses, and, as I have said, any unsatisfied prior losses may be used in second indemnity directly without the mechanism of substitution. Should it appear that substitution would enable the railway to utilize any of its losses not otherwise susceptible of use, I hold that it may be allowed under the principles established with respect to the 1864 grant.

28,436.14 acres of losses were used to select lands in indemnity limits of the 1864 grant. That quantity was charged in the adjustment of the 1864 grant, and has been credited to the 1870

grant. This addition to the 1870 losses will not, however, aid the grant, for, as will next appear, there is no place to satisfy it.

957 V

AVAILABILITY OF WITHDRAWN LANDS FOR INDEMNITY SELECTIONS

Upon the rulings now made, the deficiency under the grant of 1870 may be stated thus:

		Acres
Deficiency as calculated by plaintiff		572, 724. 18
Add: Selections under lieu acts		8, 568. 29
Deficiency		581, 292. 47
The same result is reached by reference to the deficiency as calculated by defendants, or		1, 218, 953. 46
Less:		
Unsurveyed in first indemnity	80	
Tacoma Overlap	637, 580. 99	
		637, 660. 99
Deficiency		581, 292. 47
The unsatisfied losses are (N. P. exhibit 141, revised):		
Unsatisfied prior losses	788, 726. 83	
Less: Tacoma Overlap	637, 580. 99	
		151, 145. 84
Unsatisfied subsequent losses:		
Washington	122, 791. 21	
Oregon	278, 060. 93	
		400, 852. 14
		551, 997. 98
Add: 1870 losses used in selections in 1864 limits		28, 436. 14
		580, 434. 12

As noticed under the 1864 grant, and for the reasons stated there, the unsatisfied losses do not exactly equal the calculated deficiency, but they do approximately.

958 The Withdrawn lands are as follows:

GRANT OF 1864

SECOND INDEMNITY LIMITS—WASHINGTON

Govt. Ex.	Date	Purpose	Acres
220	March 1, 1893	Forest	199, 008. 18
221	Dec. 18, 1902	"	11, 160. 00
222	Aug. 27, 1906	"	2, 233. 48
			213, 001. 66

FIRST INDEMNITY LIMITS—WASHINGTON

Govt. Ex.	Date	Purpose	Acres
223	March 1, 1898	Forest	127,595.81
224	Dec. 18, 1902	"	22,538.98
225	Aug. 27, 1906	"	5,120.00
226	July 2, 1910	Power	393.05
227	Dec. 15, 1913	"	80.00
	Total withdrawn, Grant of 1870		155,727.84 368,729.50

It is evident that the withdrawn lands are not nearly sufficient to meet the unsatisfied losses. Vacant lands outside reserves are comparatively negligible. Nevertheless, the condition for laying down second indemnity limits in Washington not having happened, the lands within those limits may not be used in reduction of the deficiency. They were never rightfully available for selection, and, of course, the forest withdrawals therein are valid and the company can not have compensation for any of them.

Though there was no deficiency in Washington at final location, there was in the grant as a whole. All the place lands in Oregon had been lost to the grant, the deficit in that state exceeding the surplus in Washington. The deficiency in the grant as a whole has always existed, so that under the Forest Reserve rule all the withdrawals in first indemnity were invalid, and the company may have compensation for them. This is true even if mineral and unsurveyed lands, as well as lands actually available, be counted.

959 The statements show that the company has received patents for 1,191.59 acres within second indemnity in Washington. I must regard these lands as within the same category as lands erroneously patented under the 1864 grant. The company may keep them and they should be charged to the grant.

I believe that any incidental questions not specifically mentioned fall within the rulings under the other grant.

FINDINGS AND CONCLUSIONS

The order by reference directs me to report to Your Honor findings of fact and conclusions of law. Counsel evidently interpret that direction as calling for formal findings and conclusions because they have filed with me numerous requests. I shall, therefore, so treat the order. I wish it to be distinctly understood, however, that if anything in these findings or conclusions seems to be, because of their necessary brevity or otherwise, in conflict with or in modification of anything said in the body of

the report, it is not intended. I wish them interpreted with reference to the extended discussion of the several questions.

As each of the subjects discussed by counsel and covered in the body of the report herewith transmitted is to a great degree separate and distinct from all others, I have thought it wise so far to depart from the general practice as to state the findings, followed by the conclusions, on each subject. This course saves much repetition and puts in concrete form the findings and conclusions on each subject. References are to pages of the report:

960 GRANT OF JULY 2, 1864

I

PORTAGE CONFLICT (PAGE 27)

The facts are:

(a) From Ashland, Wisconsin, to Superior, Wisconsin, the route of Northern Pacific Railroad Company, as authorized by the act of July 2, 1864, is upon the line of the railroad route of Portage, Winnebago & Superior Railroad Company, to aid in the construction of which lands had been theretofore granted by the United States.

(b) As far as the routes are upon the same general line the amount of land so granted was 347,141.24 acres, indicated as Area A upon Govt. Exhibit 76.

(c) The route of Northern Pacific Railroad Company is not upon the same general line as the portions of the route of said Portage Company to aid in the construction of which Areas B and C, shown on said exhibit, were granted.

The conclusions are:

(a) The quantity of 347,141.24 acres should be deducted from the amount of lands granted by the act, and the lands selected in lieu thereof should be charged to the grant as lands erroneously patented.

(b) No deduction should be made on account of Areas B and C.

II

MONTANA PLACE ERROR (PAGE 30)

The fact is:

Through error in survey certain odd-numbered sections in place limits in Montana contain more than 640 acres, the excess aggregating 5,435.46 acres.

961 The conclusion is:

This quantity should be charged to the grant as lands erroneously patented.

III

LIEU SELECTIONS (PAGE 33)

The facts are:

Under the act of July 1, 1898, and other acts for the relief of settlers, defendants selected 38,485.23 acres in indemnity limits in lieu of lands relinquished. The lieu selection rights by virtue of which such selections were made were charged to defendants.

The conclusion is:

No charge should be made by reason of such selections.

IV

QUANTITY OF DEFICIENCY (PAGE 35)

The deficiency in the grant is 2,220,224.17 acres.

V

"AGRICULTURAL LANDS" (PAGE 137)

The facts are:

(a) The lands in first indemnity limits and mineral indemnity limits, respectively, within Government reservations, described in N. P. exhibits 144 and 146, for which mineral base is assigned on direct selection, are not agricultural lands in the sense that they are tillable, except those listed on page 41, which are tillable. They are not mineral lands, and are not iron or coal.

(b) The lands in first indemnity limits described in N. P. exhibit 145, for which mineral base is assigned in substitution for subsequent losses originally used, are not mineral lands, patents having been issued therefor upon the original selections. They are not iron or coal.

962 The conclusions are:

(a) The phrase "agricultural lands" as used in Section 3 of the act of July 2, 1864, is intended to be used in opposition to the phrase "mineral lands" and to include all lands not mineral, and not iron, and not coal.

(b) The lands described in N. P. exhibits 144, 145, and 146 for which mineral base is assigned are of such character as to be selectable as indemnity for mineral losses.

NOTE.—It is not readily ascertainable which, if any, of the lands described in said exhibits are included within the lists conceded to be mineral. Any such are excepted from this conclusion.

VI

ABSAROKA AND BEARTOOTH FORESTS (PAGE 59)

The facts are:

(a) 314,544.05 acres within the Absaroka and Beartooth National Forests, and within the place limits of the grant, were part of the Crow Indian Reservation when the railroad line opposite them was definitely located.

(b) Said lands were restored to the public domain in 1882, and so remained until they were withdrawn for national forests.

The conclusion is:

Said lands are subject to the same rules as may apply to other withdrawn lands, within the principle of the Forest Reserve case.

VII

FORT ELLIS LANDS (PAGE 64)

The facts are:

(a) 3,300.82 acres within the place limits of the grant were part of Fort Ellis Military Reservation when the railroad line opposite them was definitely located.

963 (b) The reservation was thereafter abandoned.

(c) By act of April 13, 1891, the lands were made subject to entry under the general land and mining laws of the United States.

The conclusion is:

The lands were not restored to the public domain, and therefore were not selectable by the company as indemnity.

VIII

NORTHERN CHEYENNE INDIAN RESERVATION (PAGE 66)

The facts are:

(a) 52,050.93 acres within first and second indemnity limits in Montana were reserved by the United States as part of the Northern Cheyenne Indian Reservation after the line of railroad opposite them was definitely located.

(b) The lands, when so reserved, were unoccupied and unappropriated public lands.

The conclusion is:

Northern Cheyenne Indian Reservation is a Government reservation within the meaning of Section 1 of the act of June 25, 1929, and the lands therein are therefore governed by the same rules as may apply to lands within national forests and other Government reservations.

IX

SUBSTITUTION OF LOSSES (PAGE 69)

The facts are:

(a) By mistake in the printed Statutes at Large the words "and within fifty miles thereof" were omitted from the provisions for indemnity for mineral losses in Section 3 of the act of July 2, 1864.

964 (b) The error was discovered in 1904.

(c) Both the company and the officials of the Department of the Interior assumed the printed statute to be correct and that therefore indemnity for mineral losses could be selected without limit of distance from the line of the road.

(d) Acting upon that supposition the company used its general losses in first indemnity; whereas, but for the mistake, it would have used them in second indemnity, reserving mineral losses for first indemnity; and therefore by this mutual mistake the company was misled to its prejudice.

(e) The Secretary of the Interior had permitted, or had refused, substitution of base for reasons which appeared to him, in the exercise of his administrative discretion, to be sufficient.

(f) After the discovery of the error in the printing of the statute, the company filed three requests for substitution. The requests were denied.

(g) After such denial, Messrs. Britton & Gray, counsel for the company at Washington, D. C., in a communication to the Secretary of the Interior, expressed the view that the action of the Department was reasonable.

The conclusions are:

(a) The Secretary of the Interior, in the exercise of administrative discretion, might properly permit or refuse substitution of base, as on occasion he did. Likewise the court, in the exercise of judicial discretion, in the application of established principles of equity, may permit or refuse it.

(b) The maxim "He who seeks equity must do equity" requires that the substitution proposed by N. P. exhibit 145 be allowed.

965 (c) The mutual mistake as to the terms of the mineral indemnity proviso was not a mistake of law, but of fact, and is therefore correctible.

(d) The mistake should be corrected by permitting the company to withdraw its assigned general losses and substitute therefor mineral losses as proposed by said exhibit.

(e) The action of the company in making its several assignments of general losses was not an election, first, because the common-law doctrine of election is not applicable to these selections, and, second, because, if it were, the election was made under a mistake of fact and is not binding.

(f) After denial by the Department of its requests for substitution the company had no remedy, and did not acquiesce in the rejection of its requests.

(g) The letter from Messrs. Britton & Gray did not amount to nor evidence any acquiescence by the company in the general principle of the right of substitution, nor amount to more than a statement by counsel to the Secretary that they would pursue the matter no further before him. It could not have been said that after that letter was written the company could make of him no further requests for substitution, and it most certainly does not affect the company's right under the principle that the plaintiff must do equity.

X

AVAILABILITY OF WITHDRAWN LANDS FOR INDEMNITY SELECTIONS: (PAGE 102)

The facts are:

(a) On March 1, 1898, prior to the withdrawals of that date for governmental purposes, the vacant surveyed nonmin-

966 eral lands within the indemnity limits of the grant of July 2, 1864, were insufficient to supply the unsatisfied losses in place, and that condition obtained until after all the withdrawals for governmental purposes within those limits had been made.

(b) A withdrawal of 5,120 acres was made for forest purposes February 3, 1892, and there is no proof that the grant was then deficient.

(c) On December 31, 1935, counting withdrawn lands, whether surveyed or unsurveyed, but excluding mineral, there was an excess of approximately 24,000 acres.

(d) The vacant lands in second indemnity limits in Idaho, including withdrawn lands, together with selections heretofore made in said limits, exceed the subsequent losses in that state by approximately 30,000 acres.

: It must be left to counsel to ascertain exact acreage in in other instances. So also, in general, with matters of tion.

conclusions are:

What may be selected as indemnity depends upon the the lands sought to be selected at the moment of choice, neither mineral lands nor unsurveyed lands could be taken faction of losses. In determining, therefore, whether the n indemnity limits were sufficient to supply the losses, mineral nor unsurveyed lands should be counted.

All the withdrawals listed in Govt. exhibits 110, 111, 113 both inclusive, 152A, 161A, 184A, 184AA, 184B, 110A, 88A, 188B, and 188C were invalid and ineffective as the indemnity selection rights of the defendants, except s to 3,300.82 acres of abandoned Fort Ellis lands.

(c) Northern Pacific Railway Company may designate nd have compensation under the act of July 25, 1929, for withdrawn lands, with the exception just noted, to the of the deficiency as found, save that in second-indemnity n Idaho it may not select, including valid selections here- made in said limits, more than the quantity of its subse- osses in Idaho, and save that it may not select lands con- o be mineral.

In designating land for which it claims compensation, the need not specify a particular loss in place for each in- y tract for which compensation is claimed.

XI

ANDS PATENTED TO HOMESTEADERS AFTER WITHDRAWAL

fact is:

31 acres within withdrawn lands were entered under the homestead laws or by other filings after withdrawal and o June 5, 1924, and patents therefor were subsequently to the applicants.

conclusion is:

the withdrawals were invalid, the company should have sation as though the lands remained in their withdrawn nd had not been patented. The principle applied to the n Cheyenne Indian allotments applies here. What the nent did with the lands after they had been placed, by wal, beyond the reach of the company, can have no effect r upon the company's rights.

GRANT OF MAY 31, 1870

I

AUTHORIZATION OF SECOND-INDEMNITY LIMITS (PAGE 120)

It is concluded the Joint Resolution of May 31, 1870, authorized the laying down of second-indemnity limits in Washington in event of deficiency at final location.

968

II

TACOMA OVERLAP (PAGE 123)

The facts are:

637,580.99 acres in odd-numbered sections within the place limits of the grant of 1870 for the line from Portland to Puget Sound, southeast of Tacoma, were comprehended by the place limits of the grant of 1864 for the line from Pasco to Puget Sound. Both lines were definitely located and were constructed.

The conclusion is:

The Company is not entitled to indemnity for the lands which it got by the 1864 grant.

III

LIEU SELECTIONS (PAGE 138)

The fact is:

Under the act of July 1, 1898, and other acts for the relief of settlers, defendants selected 8,568.29 acres in indemnity limits in lieu of lands relinquished. The lieu selection rights by virtue of which such selections were made were charged to the grant.

The conclusion is:

No charge should be made by reason of such selections.

IV

EIGHTY ACRES (PAGE 139)

The fact is:

Eighty acres of first-indemnity land outside government reservations remain unsurveyed.

The conclusion is:

The land should be patented to the company and charged to the grant.

969

V

QUANTITY OF DEFICIENCY (PAGE 140)

The deficiency in the grant is 572,724.17 acres.

VI

AVAILABILITY OF WITHDRAWN LANDS FOR INDEMNITY SELECTIONS (PAGE 140)

The facts are:

(a) On final location in the Territory of Washington the vacant lands within the first indemnity limits were sufficient to supply the place losses.

(b) In 1906 second indemnity limits were laid down in Washington and 1,191.59 acres therein have been patented to the company. 200 acres additional have been selected.

(c) On final location in the grant as a whole the vacant lands within the indemnity limits of the grant were insufficient to supply the place losses, and that condition has since obtained.

The conclusions are:

(a) The second indemnity limits in Washington should not have been laid down, and the lands therein were never rightfully available for selection.

(b) 1,191.59 acres in second indemnity limits patented to the company should be retained by it and charged to the grant, the same principle applying as in the case of other lands erroneously patented. Selections of 200 acres additional therein should be cancelled.

(c) All withdrawals in second indemnity limits are valid and defendants cannot have compensation for any thereof.

(d) All withdrawals in first indemnity limits listed in Govt. exhibits 223 to 227, both inclusive, were invalid and
970 ineffective as against the indemnity selection rights of the defendants.

(e) Northern Pacific Railway Company may designate and have compensation under the act of July 25, 1929, for all withdrawn lands in first indemnity limits, except such as are conceded to be mineral, to apply upon the deficiency as found.

BOTH GRANTS

I

LANDS CONCEDED TO BE MINERAL

The facts are:

The following lands are mineral (other than coal and iron) and are excepted from the grant:

a. Those lands in the place limits in Montana listed and described on the schedule offered by the defendants and appearing on pages 587–589 of the transcript, aggregating 11,254.73 acres;

b. Those lands in the place limits in Idaho listed and described on the schedule offered by the defendants and appearing on pages 590–591 of the transcript, aggregating 21,208.07 acres;

c. Those lands in the place limits in Washington listed and described on the schedule offered by the defendants and appearing on pages 592–593 of the transcript, aggregating 3,210.30 acres;

d. Those lands in the second indemnity belt in Montana listed and described on the schedule offered by the defendants and appearing on page 598 of the transcript, aggregating 7,265.56 acres;

e. Those lands in the second indemnity belt in Idaho, aggregating 2,701.00 acres, and described as follows:

	Sec.	T. N.	R. W.	Acres
All	1	42	2	637.76
NE¼, N½NW¼, SE¼NW¼	11	42	2	280.00
All	31	43	2	623.24
S½SE¼, NE¼SE¼, SW¼, S½NW¼, NW¼NW¼	33	43	2	400.00
S½, NE¼, S½NW¼, NE¼NW¼	35	43	2	600.00
N½NW¼, SE¼NW¼, NW¼NE¼	35	43	3	160.00

f. Those lands in the first indemnity belt in Idaho, aggregating 5,602.12 acres, and described as follows:

	Sec.	T. N.	R. W.	Acres
All	1	44	5	640.00
"	5	"	"	640.00
"	7	"	"	320.00
W½	9	"	"	320.00
E½	13	"	"	320.00
All	17	"	"	640.00
"	19	"	"	237.96
"	21	"	"	640.00
W½	27	"	"	320.00
All	29	"	"	640.00
"	31	"	"	244.16
"	33	"	"	640.00

g. Those lands listed and described on the schedule offered by the defendants, beginning on page 798 of the transcript, aggregating 92,276.70 acres;

h. Those lands listed and described on the schedule offered by defendants and appearing on page 890 of the transcript, aggregating 1,211.79 acres in the place limits of Washington under the grant of July 2, 1864, and 242.78 acres in place limits of Washington under the grant of 1870;

i. Those lands listed on the schedule offered by the defendants and appearing on page 1452 of the transcript, aggregating 1,035.41 acres.

NOTE.—The lands mentioned in a, b, c, d, g, h, and i were conceded by both sides during the taking of the testimony to be mineral. Those described in e and f were determined to be mineral by correspondence. I have filed as Govt. exhibit 302 a letter from Judge Biggs to me, dated May 24, 1937, en-
972 closing copies of the correspondence touching these items.

Since the descriptions appear in part at various places in the transcript and in part have been determined by correspondence, and since item g, as it appears in the transcript does not show the acreage, I suggest that the parties file a stipulation describing the lands conceded to be mineral. Upon their doing so, this finding will be deemed to refer to the lands described in such stipulation.

II

LANDS LISTED OR SELECTED BUT NOT PATENTED

The facts are:

The place lands described in N. P. exhibits 149–158, both inclusive, and the indemnity lands described in said exhibits for which nonmineral losses are assigned, are nonmineral lands. The indemnity lands described in said exhibits, for which mineral losses are assigned, are nonmineral lands, and are not iron or coal.

The Conclusion is:

The railway company is entitled to patent for the lands described in said exhibits.

NOTE.—Excepted from this conclusion are any of such lands as are conceded to be mineral.

The order also directs the special master to report recommendations for an order or decree. Counsel have not advised me what is expected in this respect. Indeed, they did not refer to the subject either in oral argument or in briefs. Still the direction is there, and I suppose I should pay some attention to it. The copy of the special statute of appeal in this case (I have not the date before me) uses the phrase "order or decree." So, likewise, is the direction in the reference. In equity practice the word "order" has always, and does still, refer to those

973 short and informal matters which are called to the court's attention in the progress of the cause. Formerly motions for such orders were made orally. They still are as to some matters, but are more usually in writing. The word "decree" in equity practice has always, and still does, refer to the more formal and solemn adjudication of the rights of the parties. This is as true of an interlocutory as of a final decree. Concrete to the case before us, I presume the word "order", as used in both the statute and the direction of reference, refers to Your Honor's action in sustaining or overruling exceptions which may be taken to this report, and to any other directions concerning it. The word "decree" obviously refers to an interlocutory decree to be made at this time. I suppose that decree should finally and fully adjudicate the rights of the parties in this case. It should, in form as well as in substance, wind up this litigation and determine, once and for all, the respective rights of the government and the railroad under the grants of the company. It should, of course, leave open the question of any determination which may be necessary upon the subject of compensation to the company for lands in the governmental reserves retained by the United States. It is very closely analogous to a decree for the plaintiff in a patent right case, that decree leaving open only the subject of accounting for profits and damages for the infringement. I do not see that I am able to make any other suggestion on this point that would be helpful to Your Honor or to counsel.

974 I certify that the five bound typewritten volumes of testimony, transmitted herewith, comprising 1,481 pages, constitute a full, true, and correct transcript of the testimony taken under the amended order of reference dated the 21st day of April 1936, at Washington, D. C., April 28 to May 2, 1936, and at Spokane, Washington, June 15 to June 20, 1936, September 2 to 5, 1936, and January 27 to February 15, 1937, and that the exhibits transmitted herewith, being Government exhibits 66 to 301, both inclusive, and Northern Pacific exhibits 131 to 167A, both inclusive, and indexed in said volumes, are the exhibits admitted in evidence. Govt. exhibit 302 is the one stipulated by correspondence to which reference is made above.

Accompanying the exhibits in a separate envelope are numerous documents, and a map, not introduced as exhibits, but submitted to me for convenience of reference. Also in a separate envelope, which I have marked N. P. exhibit 168, are the maps submitted by the railway company in support of its claim that

lands for which it tendered mineral base in substitution are not iron lands, and correspondence pertaining thereto.

F. H. GRAVES,
Special Master.

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976 In United States District Court

Motion to strike from Master's report

Filed Dec. 10, 1937

The undersigned defendants move the Court for an order striking from the Master's report that portion thereof beginning on page 135 and ending on page 138, in which he stated, in effect, that the claim presented by defendants for indemnity in favor of the Portland-Tacoma line, for loss of lands within the Tacoma Overlap, was an afterthought; or in the alternative, that the Court or the Master receive evidence that defendants have claimed said Tacoma Overlap as a loss to the Portland-Tacoma line; and as grounds for this motion state the following facts and submit the attached affidavit of J. M. Hughes, to wit:

On the trial of this cause before the Special Master, and while the witness Schwarm was under examination by defendants, the following occurred at Tr. 1470:

"Q. Now, yesterday some testimony was given to the effect that the railway company in the grant of 1870 never attempted to use losses in the Tacoma Overlap that arises from the grant of lands by the Act of 1864, and that were earned by the construction of the branch line, to use those losses for base in making indemnity selections in the grant of 1870. What are the facts as to the amount of losses in the grant of 1870 on hand and the amount of available surv'ed land for selections in satisfaction of those lists?

"A. The railway company has always had on hand a large amount of losses in the grant of 1870—a great deal larger than an amount of vacant surveyed indemnity land which we could select.

"The MASTER. That is, you had more bases than available selections?

"A. We always had a great deal more bases than available indemnity selections.

"Q. There was a statement made yesterday that the Tacoma Overlap was an afterthought—what have you to say about that?

"Judge BIGGS. May it please the Court—that I don't think is necessary. Your Honor asked me a question——

"Mr. FROST. I want to get at it in as short a way as possible, and he has been in the Department since 1910.

"Q. Now, tell us what you did about it.

"The MASTER. You mean about using it—why they did or didn't use the Overlap land as a base?

"Mr. FROST. He has stated there was always a disproportionate amount of losses on hand——

"The MASTER. That may be so—do you mean you want him to tell us why they didn't use the overlap?

977 "Mr. FROST. No; whether the railway company, during the time he has been in this land department, starting with 1910, didn't always deem the Tacoma Overlap as a loss.

"Judge BIGGS. I object to that. What they may have 'Deemed'——

"Mr. FROST. The statement was made yesterday—it was purely an afterthought.

"The MASTER. That was by way of argument—I am not sure but what it was an off-the-record discussion. Now, Gentlemen, it gets to a perfectly plain proposition—either that the Tacoma Overlap, as a matter of law is a loss, or it isn't. I don't think it makes a bit of difference whether it's a forethought, or afterthought, or a middle thought—what they deemed in the Land Department of the Northern Pacific Railway, or anywhere else—that it is a pure and simple question of law.

"Mr. FROST. I will not press that question."

Defendants state that by the said objection of counsel for plaintiff and the Master's ruling thereon sustaining the same they were prevented from proving the facts stated in the affidavit of J. M. Hughes hereto attached; that plaintiff by said objection is estopped from contending that defendants' claim to indemnity for the loss of said lands in the Tacoma Overlap is an afterthought, or that there has been by defendants or by plaintiff a practical construction of said Act of July 2, 1864, or said Joint Resolution that defendants are not entitled to said indemnity, or an admission by defendants that they were not so entitled; and that said portion of the Master's report, which defendants now move to strike, was inadvertent and contrary to the position taken by plaintiff in making said objection and the ruling of the Master thereon; and contrary to the facts which, but for said objection and ruling, defendants could and would have proved, as stated in said affidavit of J. M. Hughes hereto attached.

L. B. DAPONTE,
D. R. FROST,
F. J. MCKEVITT,
Solicitors for defendants, Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company.

F. J. MCKEVITT,
Solicitors for defendant Bankers Trust Company.

F. J. MCKEVITT,
Solicitors for defendant City Bank Farmers Trust Company.

978 *Affidavit of J. M. Hughes*

STATE OF MINNESOTA,
County of Ramsey, ss.

J. M. Hughes, being sworn, states that he entered the employ of Northern Pacific Railroad Company in the spring of 1896 as a clerk in the Land Grant Adjustment Division of the Land Department and has remained in the Land Department of the Northern Pacific Railway Company at all times since in various capacities and as Land Commissioner at all times since 1919, and has custody of all of the records of said Land Department and is familiar with the same.

Affiant states that ever since the decision of the Supreme Court in the case of United States v. Northern Pacific Railroad Company, decided March 5, 1894, reported in 152 U. S. 284, the position of the Northern Pacific Railroad Company and Northern Pacific Railway Company with respect to said Tacoma Overlap has been that the lands therein were earned by construction of

the Cascade Branch under the Act of July 2, 1864, and that said Railway Company is entitled to indemnity in favor of the Tacoma-Portland line, constructed under the Joint Resolution of 1870, for the lands so lost to the Cascade Branch, constructed under the Act of July 2, 1864.

Affiant states that this position of the Northern Pacific Railway Company is shown by the records of the Land Department under his control; particularly, that between the years 1890 and 1894, but prior to the decision in 152 U. S. 284, Colonel W. P. Clough, then General Counsel of Northern Pacific Railroad Company, gave a lengthy opinion, undated, for the guidance of the Land Commissioner of the Northern Pacific Railroad Company, and therein discussed various questions, including the question whether said Portland-Tacoma line was constructed under the Act of July 2, 1864, or the Joint Resolution of 1870, and discussed the Tacoma Overlap and advised that if it should be determined that the Cascade Branch was constructed under the Act of July 2, 1864, and not under the Joint Resolution of 1870, the lands therein were earned by said Cascade Branch, and the grant to the Tacoma-Portland line would be a junior grant, and said line would be entitled to take lands within its in-
979 demnity limits for the loss of said lands within said Tacoma Overlap to the Cascade Branch. Colonel Clough concluded his discussion of this feature as follows:

"Furthermore, as both lines (branch line and main line) have been completed, if the grants for the two were of different origin and date, the junior line has suffered a loss which may be supplied from its indemnity limits. * * *

"The correctness of the conflicting theories mentioned above can be conclusively settled by judicial decision alone.

"Hence it seems highly important that the test cases already begun for that purpose be pressed for final judgment as soon as practicable."

In said suit, United States v. Northern Pacific Railroad Company, 152 U. S. 284, the question was decided by the Supreme Court; namely, that the Cascade Branch was constructed under the Act of July 2, 1864, and that the Tacoma-Portland line was constructed under the Joint Resolution of May 31, 1870. By said decision it was settled that the lands in said Tacoma Overlap were earned by construction of the Cascade Branch under the said Act of July 2, 1864. In the later case of Northern Pacific v. DeLacey, 174 U. S. 622, decided May 22, 1899, a similar decision was made and the court cites the case of United States v. Northern Pacific Railroad Company, supra.

On September 13, 1895, the Receivers of the Northern Pacific Railroad Company filed suit in the United States Circuit Court

for the Western District of Washington against O'Connor & Lynch, praying for an injunction against cutting of timber in the NW¼ of Sec. 27–18N–9W, Grays Harbor County, being indemnity lands in the first indemnity limits under the grant of 1870, selected by the Railroad Company but not patented. Therein an affidavit was made by William H. Phipps, then Land Commissioner of Northern Pacific Railroad Company, dated September 7, 1895, setting out losses to both grants, and on pages 13 and 14 of said affidavit, the following appears:

"The lands indicated in Schedule 'A' as lost because of 'Conflict grant July 2nd, 1864' are lands which are located in the overlap between the grant made by the act of Congress approved July 2, 1864, to aid in the construction of the Cascade Branch and the grant made by the Joint resolution of May 31, 1870, to aid in the construction of the line of railroad extending from Tacoma to Portland, and which inure to said Cascade branch under the terms of said act of July 2, 1864, but are excluded from the grant by said joint resolution of May 31, 1870, *and for which said Northern Pacific Railroad Company is entitled to take indemnity.*" [Italics supplied.]

980 On page 2–A of Schedule "A", attached to said affidavit, the losses for the grant of 1870 in the State of Washington, are separately listed and the following items appear in the tabulation:

	Acres
Conflict Grant July 2, 1864, Surveyed	375,481.63
Conflict Grant July 2, 1864, Unsurveyed	271,200.00

The sum of these two items is 646,681.63 acres, which approximates the amount estimated at the present time in the Tacoma Overlap.

Affiant further states that prior to the year 1906, the Northern Pacific Land Department kept no book record of losses. About the year 1906 a set of loss books covering the entire grant, showing descriptions of the lands lost, was prepared. Said loss books show as a loss to the grant of 1870 the lands within the Tacoma Overlap earned by construction of the Cascade Branch under the Act of 1864 to the full extent of the conflict. Affiant states that these records are available for inspection of plaintiff's counsel and states that said books herein mentioned are among the records referred to by witnesses Schwarm as having been taken to Washington and kept there during the years 1921 to 1923, prior to commencement of this suit, and that representatives of plaintiff had full access to, examined same, and are familiar therewith.

[SEAL] J. M. HUGHES.

Subscribed and sworn to before me this 26th day of November 1937.

S. A. BERTELSEN,
Notary Public, Ramsey County, Minn.

My commission expires March 23, 1940.
[File endorsement omitted.]

981 In United States District Court

Order on amended motion to rerefer to the special master and order on motion to strike from the special master's report

Filed Dec. 18, 1937

Defendants' amended motion to rerefer this case to the special master coming on this day for hearing in open court, plaintiff appearing by Messrs. Danly and Pope, and defendants by Messrs. daPonte and Frost, and the Court being fully advised, it is

Ordered that said motion be passed without prejudice until after argument on the exceptions of both parties to the special master's report dated July 26, 1936, and at that time may be renewed and disposed of with reference to the circumstances and conditions then existing.

The defendants' motion to strike a certain portion of the master's report this day coming on to be heard, the parties being represented as above stated, and the Court being fully advised, it is

Ordered that said motion be and the same is hereby denied.

Dated this 18th day of December, 1937.

J. STANLEY WEBSTER,
United States District Judge.

OK as to form:
L. B. DAPONTE,
Of counsel for Deft.
E. E. DANLY,
Of counsel for Pltf.

982 In United States District Court

Exceptions of defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation

Filed Aug. 9, 1937

Now come the defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corpora-

tion, and Northwestern Improvement Company, a corporation, and take the following exceptions to the report of the Special Master, Honorable Frank H. Graves, filed with the clerk of this Court on July 26, 1937:

I

The above-named defendants except (a) to the finding (Report, pp. 143, 30) that the route of the Northern Pacific Railroad Company between Ashland, Wisconsin, and Superior, Wisconsin, is upon the line of the railroad route of the Portage, Winnebago & Superior Railroad Company; (b) to the finding (Report, p. 143) that as far as the routes are upon the same general line the amount of land so granted to Portage, Winnebago & Superior Railroad Company was 347,141.24 acres; (c) to the conclusion (Report, pp. 143, 30) that 347,141.24 acres should be deducted from the area of the grant to the Northern Pacific Railroad Company and that the lands selected in lieu thereof should be charged to the grant as lands erroneously patented; (d) to the finding (Report, p. 36) that the deficiency under the grant of July 2, 1864, is 2,220,224.17 acres or any area less than 2,567,365.41 acres; (e) to the finding (Report, p. 37) that the unsatisfied losses in the hands of defendant, Northern Pacific Railway Company, are 2,269,707.75 acres, or any quantity less tha 2,616,848.99 acres.

II

These defendants except (a) to the finding (Report, p. 152) that the deficiency in the grant of May 31, 1870, is only 572,724.17 acres or any area less than 1,218,953.46 acres; (b) to the finding (Report, p. 152) that on final location in the Territory of Washington of the line of railroad between Portland, Oregon, and Tacoma, Washington, the vacant lands within the first indemnity limits in Washington were sufficient to supply the place losses of the grant for said line in said Territory; (c) to the conclusion (Report, p. 152) that the second-indemnity limits in Washington should not have been laid down and that the lands therein were never rightfully available for selection; (d) to the conclusion (Report, p. 152) that all withdrawals for national-forest reserves in said second-indemnity limits are valid and that defendants can not have compensation for any of said lands; (e) to the conclusion (Report, p. 151) that the company is not entitled to indemnity under the grant of May 31, 1870, for the lands in the Tacoma Overlap which it got by the grant of July 2, 1864; (f) to the conclusion (Report, p. 152) that selections of

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200 acres additional in second-indemnity limits in Washington should be canceled; (g) to the conclusion (Report, p. 138) that the lands within the Tacoma Overlap cannot be regarded as lost to the grant of May 31, 1870, and that indemnity may not be had for them; (h) to the finding (Report, p. 137) that had the Northern Pacific supposed it was entitled to indemnity under the grant of May 31, 1870, for the lands in Tacoma Overlap because of the prior grant, it would not have laid by through all the years and never asserted the right; (i) to the finding (Report, p. 140) that the deficiency under the grant of May 31, 1870, is no more than 581,292.47 acres or any area less than 1,218,953.46 acres and that the unsatisfied losses in the hands of defendant, Northern Pacific Railway Company, are no more than 580,434.12 acres or any quantity less than 1,218,015.11 acres; (j) to the conclusion (Report, p. 141) that the condition for laying down second-indemnity limits in Washington not having happened, the lands within those limits may not be used in reduction of the deficiency, that said lands were never rightfully available for selection, that the forest withdrawals therein are valid, and that the company cannot have compensation for any of said lands.

III

These defendants except to the conclusion (Report, p. 10) that the losses to be satisfied within second indemnity limits of a particular State or Territory are restricted to those originating within the same State or Territory.

IV

These defendants except to the conclusion (Report, pp.
984 108, 109) that the Government may reserve or appropriate to its own uses lands in the indemnity limits so long as that which remains is sufficient to meet all unsatisfied losses.

L. B. DAPONTE,
F. J. MCKEVITT,
D. R. FROST,

Solicitors for defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation.

[File endorsement omitted.]

985 In United States District Court

Supplemental exceptions of defendants

Filed Aug. 11, 1937

Now come the defendants, Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company, and in addition to the exceptions filed with the Clerk August 9, 1937, take the following exceptions to the report of the Special Master, Honorable Frank H. Graves, filed with the Clerk of this Court on July 26, 1937:

I

The above named defendants except to the omission on page 105 of the report in the enumeration of withdrawals in first indemnity limits in Washington of that certain withdrawal of 799.95 acres of said Washington first indemnity lands for forest purposes on October 10, 1924, said area being described in detail in Northern Pacific Railway Exhibit 144 on page 10 thereof. Plaintiff in its exhibits showing the areas of lands withdrawn on December 31, 1935, included said 799.95 acres in the total area of withdrawals.

II

The above named defendants except (a) to the finding (Report, p. 106) that 3,300.82 acres of Fort Ellis lands are closed to selection; and (b) to the finding (Report, p. 106) that 92,276.70 acres of withdrawn lands are conceded to be mineral and are hence ineligible; and (c) to the finding (Report, p. 106) that these deductions bring the total down to about 2,244,000 acres. Said areas of 3,300.82 acres of Fort Ellis lands and of 92,276.70 acres of conceded mineral lands are not described in any of the plaintiff's exhibits enumerated on pages 103, 104, and 105 of the report, and hence said areas are not included in any of the totals shown on said pages 103, 104, and 105.

L. B. DAPONTE,
D. R. FROST,
F. J. MCKEVITT,
Solicitors for defendants, Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company.

[File endorsement omitted.]

986 In United States District Court

Exceptions of defendants, Bankers Trust Company, a corporation, and City Bank Farmers Trust Company, a corporation

Filed Aug. 13, 1937

Come now the defendants, Bankers Trust Company, a corporation, and City Bank Farmers Trust Company, a corporation, and take the following exceptions to the report of the Special Master, Honorable Frank H. Graves, filed with the clerk of this Court on July 26, 1937:

I

The above named defendants except (a) to the finding (Report, pp. 143, 30) that the route of the Northern Pacific Railroad Company between Ashland, Wisconsin, and Superior, Wisconsin, is upon the line of the railroad route of the Portage, Winnebago & Superior Railroad Company; (b) to the finding (Report, p. 143) that as far as the routes are upon the same general line the amount of land so granted to Portage, Winnebago & Superior Railroad Company was 347,141.24 acres; (c) to the conclusion (Report, pp. 143, 30) that 347,141.24 acres should be deducted from the area of the grant to the Northern Pacific Railroad Company and that the lands selected in lieu thereof should be charged to the grant as lands erroneously patented; (d) to the finding (Report, p. 36) that the deficiency under the grant of July 2, 1864, is 2,220,224.17 acres or any area less than 2,567,365.41 acres; (e) to the finding (Report, p. 37) that the unsatisfied losses in the hands of defendant Northern Pacific Railway Company are 2,269,707.75 acres, or any quantity less than 2,616,848.99 acres.

II

These defendants except (a) to the finding (Report, p. 152) that the deficiency in the grant of May 31, 1870, is only 572,724.17 acres or any area less than 1,218,953,46 acres; (b) to the finding (Report, p. 152) that on final location in the Territory of Washington of the line of railroad between Portland, Oregon, and Tacoma, Washington, the vacant lands within the first indemnity limits in Washington were sufficient to supply the place losses of the grant for said line in said Territory; (c) to the conclusion (Report, p. 152) that the second indemnity limits in Washington should not have been laid down and that the lands therein were never rightfully available for selection; (d) to the

987 conclusion (Report, p. 152) that all withdrawals for national forest reserves in said second indemnity limits

are valid and that defendants cannot have compensation for any of said lands; (e) to the conclusion (Report, p. 151) that the company is not entitled to indemnity under the grant of May 31, 1870, for the lands in the Tacoma Overlap which it got by the grant of July 2, 1864; (f) to the conclusion (Report, p. 152) that selections of 200 acres additional in second indemnity limits in Washington should be canceled; (g) to the conclusion (Report, p. 138) that the lands within the Tacoma Overlap cannot be regarded as lost to the grant of May 31, 1870, and that indemnity may not be had for them; (h) to the finding (Report, p. 137) that had the Northern Pacific supposed it was entitled to indemnity under the grant of May 31, 1870, for the lands in Tacoma Overlap because of the prior grant, it would not have laid by through all the years and never asserted the right; (i) to the finding (Report, p. 140) that the deficiency under the grant of May 31, 1870, is no more than 581,292.47 acres or any area less than 1,218,953,46 acres, and that the unsatisfied losses in the hands of defendant Northern Pacific Railway Company are no more than 580,434.12 acres or any quantity less than 1,218,015.11 acres; (j) to the conclusion (Report, p. 141) that the condition for laying down second indemnity limits in Washington not having happened, the lands within those limits may not be used in reduction of the deficiency, that said lands were never rightfully available for selection, that the forest withdrawals therein are valid, and that the company cannot have compensation for any of said lands.

III

These defendants except to the conclusion (Report, p. 10) that the losses to be satisfied within second indemnity limits of a particular State or Territory are restricted to those originating within the same State or Territory.

IV

These defendants except to the conclusion (Report, pp. 108, 109) that the Government may reserve or appropriate to its own uses lands in the indemnity limits so long as that which remains is sufficient to meet all unsatisfied losses.

F. J. McKevitt,
White and Case,
Taylor, Blanc, Capron & Marsh,
Solicitors for defendants, Bankers Trust Company, a corporation, and City Bank Farmers Trust Company, a corporation.

[File endorsement omitted.]

988 In United States District Court

Supplemental exceptions of defendants Bankers Trust Company, a corporation, and City Bank Farmers Trust Company, a corporation

Filed Aug. 13, 1937

Now come the defendants, Bankers Trust Company, a corporation, and City Bank Farmers Trust Company, a corporation, and in addition to the exceptions filed with the Clerk August 13, 1937, take the following exceptions to the report of the Special Master, Honorable Frank H. Graves, filed with the Clerk of this Court on July 26, 1937:

I

The above named defendants except to the omission on page 105 of the report in the enumeration of withdrawals in first indemnity limits in Washington of that certain withdrawal of 799.95 acres of said Washington first indemnity lands for forest purposes on October 10, 1924, said area being described in detail in Northern Pacific Railway Exhibit 144 on page 10 thereof. Plaintiff in its exhibits showing the areas of lands withdrawn on December 31, 1935, included said 799.95 acres in the total area of withdrawals.

II

The above named defendants except (a) to the finding (Report, p. 106) that 3,300.82 acres of Fort Ellis lands are closed to selection; and (b) to the finding (Report, p. 106) that 92,276.70 acres of withdrawn lands are conceded to be mineral and are hence ineligible; and (c) to the finding (Report, p. 106) that these deductions bring the total down to about 2,244,000 acres. Said areas of 3,300.82 acres of Fort Ellis lands and of 92,276.70 acres of conceded mineral lands are not described in any of the plaintiff's exhibits enumerated on pages 103, 104, and 105 of the report, and hence said areas are not included in any of the totals shown on said pages 103, 104, and 105.

F. J. McKevitt,
White and Case,
Taylor, Blanc, Capron & Marsh,
Solicitors for defendants, Bankers Trust Company, a corporation, and City Bank Farmers Trust Company, a corporation.

[File endorsement omitted.]

989 In United States District Court

Exceptions of the United States to the report of the Special Master filed on July 26, 1937

Filed Aug. 13, 1937

Comes now the plaintiff, and without waiving any of its exceptions to the former Report of the Master herein, or to the Order of the Court thereon, files the following exceptions to the report of the Special Master filed on July 26, 1937. All exceptions are to be deemed taken not only to the finding or conclusion specified, but to all findings and conclusions of like import in the general body of the report. (The transcript of evidence is referred to by the letters "Tr." followed by the page number. The Master's Report is referred to by the letter "p." followed by the page number.)

PORTAGE CONFLICT

EXCEPTION NO. 1

The plaintiff excepts to the Master's finding of fact ((b) on page 143) of his report that "As far as the routes are upon the same general line the amount of land so granted was 347,141.24 acres, indicated as Area A upon Govt. exhibit 76" and to the Master's finding to the same effect in the body of his report (pp. 27–30) for the following reasons:

(a) The uncontradicted evidence is that 417,400.66 acres, as shown on Government Exhibit 76 and by the testimony of the witness Barber (Tr. 102) is the amount of land in place within the overlapping limits of the grant made by the Act of May 5, 1864, to Wisconsin for the benefit of the Portage, Winnebago & Superior Railroad Company, and the grant made by the Act of July 2, 1864, to the Northern Pacific Railroad Company for that portion of its line from Ashland to Superior which this Court holds is upon the same general line of the route of the Portage Company and that this overlapping area of 417,400.66 acres should be deducted.

(b) The Master in his former report (p. 92) approved by the Court, held that no "title within the overlapping of these two roads ever passed to the Northern Pacific" and the Government contends the Master should have deducted the overlapping Areas of A, B, and C, aggregating 417,400.66 acres.

EXCEPTION NO. II

The plaintiff excepts to the Master's finding of fact
990 ((c) on page 143) of his report that "The route of Northern Pacific Railroad Company is not upon the same general line as the portions of the route of said Portage Company to aid in the construction of which Areas B and C, shown on said exhibit were granted" and to the Master's finding to the same effect in the body of the report (pp. 27–30), for the reason that this Court held in its former decree in this suit that the Northern Pacific earned nothing for its line from Superior to Ashland in so far as the place limits of the portion of its road overlap or conflict with the place limits of the prior grant to the Portage Company. The Areas B and C are within the place limits opposite the line from Ashland to Superior and within the place limits of the prior grant to the Portage Company.

EXCEPTION NO. III

The plaintiff excepts to the Master's conclusion of law ((a) on page 143) of his report that "The quantity of 347,141.24 acres should be deducted from the amount of lands granted by the act, and the lands selected in lieu thereof should be charged to the grant as lands erroneously patented," and to the Master's conclusion to the same effect in the body of the report (pp. 27–30), for the reason that the said conclusions are erroneous in that:

(a) The Court should have held that the deduction should be 417,400.66 acres, being the amount of overlapping lands within the place limits of that portion of the route of the Northern Pacific between Ashland and Superior and within the place limits of the prior grant to the Portage Company.

(b) The Court should have further held that since the Company acquired patents to these lands by the use of said alleged base (Exhibit R to the amended bill and Government Exhibits 76 and 289, Tr. 1409–1410), treating it as nonmineral base, although the overlapping area was not a loss to the grant, it is incumbent upon the Company now to assign valid, unused, nonmineral base for the lands so patented. The Master should have made his computation or findings as though, and to the same effect as if, the nonmineral unused losses of the Company had been reduced to that extent.

(c) Mineral base cannot be used for the reason that the
991 Company offered no evidence as to the noncoal, noniron, or agricultural character of these patented lands and there is no evidence in the record as to their character.

(d) The plaintiff did make an issue of the character of the losses thus required (See report, p. 30; plaintiff's brief, pp. 12–14), notwithstanding the statement of the Master on page 117 of his report.

EXCEPTION NO. IV

The plaintiff excepts to the Master's conclusion of law ((b) on page 143) of his report that "No deduction should be made on account of Areas B and C" and to the Master's conclusion to the same effect in the body of the report (pp. 29–30), for the reason that said ruling is erroneous as set forth above in connection with Exception No. III to the Master's conclusion of law (a) on page 143.

EXCEPTION NO. V

The plaintiff excepts to the failure of the Master to find as a fact its request (2) for findings of fact as follows:

That the acreage of said Three Areas A, B, and C aggregating 417,400.66 acres in odd-numbered sections is the amount of land in place within the overlapping limits of the grant made by the Act of May 5, 1864, to Wisconsin for the benefit of the Portage, Winnebago & Superior Company, and the grant made by the Act of July 2, 1864, to the Northern Pacific for that portion of its line from Ashland to Superior.

for the reason that the facts stated in said requested findings are established by the uncontradicted evidence of the witness Wansleben (Tr. 63 to 69, describing Exhibit 76), and of the witness Barber (Tr. 102).

QUANTITY OF DEFICIENCY

EXCEPTION NO. VI

The plaintiff excepts to the finding of the Master (p. 144) that "The deficiency in the grant is 2,220,224.17 acres" and to the like conclusion of the Master at page 36 of the report, for the reason said finding is erroneous in that it is based upon a deduction of only 347,141.24 acres on account of the overlapping of the primary limits of the Northern Pacific grant with the Portage grant whereas the deduction on account of such overlapping should have been 417,400.66 acres, for the reasons stated in Exceptions Nos. I and III.

AGRICULTURAL LANDS

EXCEPTION NO. VII.

The plaintiff excepts to the failure of the Master to find 992 as requested by its forty-second request for findings of fact:

That each and every tract of land described in Government Exhibits 237, 244 and 248 and which lands the Railway Company asks to select as indemnity for mineral loss as set forth in Northern Pacific Exhibits 144 and 146 are not agricultural lands, except those tracts listed in columns 2, 3 and 4 of said Government Exhibits 237, 244, and 248.

The uncontradicted evidence covering pages 1196 to 1379 of the Record is to this effect. If the Court is of the opinion that the Master's finding of fact (a) on page 144 of his report is a finding in substance as above requested, then this exception becomes immaterial.

EXCEPTION NO. VIII

The plaintiff excepts to the Master's finding of fact (p. 45) that "From the beginning of the administration of this grant it was consistently the understanding of Land Commissioners and Secretaries of the Interior that the phrase (agricultural lands) was one of classification and was intended to mean, and it was held did mean, all lands not mineral in character", for the reason that:

(a) This finding is contrary to the evidence introduced by the Company in the form of a letter from E. C. Finney, First Assistant Secretary of the Interior, dated May 6, 1925 (Tr. 1472–1476), in which the Assistant Secretary stated: "I find no specific ruling of the department on this point".

(b) There is no evidence from which the Master could find that the phrase was understood to be one of classification, nor was there any ruling by the Commissioner of the General Land Office or the Secretary of the Interior that it meant all lands not mineral in character.

EXCEPTION NO. IX

The plaintiff excepts to the Master's finding of fact ((b) on page 144) that "The lands in first indemnity limits described in N. P. Exhibit 145 (The Master probably means N. P. Exhibit 167), for which mineral base is assigned in substitution for subsequent losses originally used, are not mineral lands, patents having issued therefor upon the original selections. They are not iron or coal", and to the Master's finding to the same effect in

the body of the report (pp. 58–59 and 97 to 101). The plaintiff excepts to the finding that these lands are not iron or coal for the reasons that:

(a) The sole evidence as to their coal character is the evidence of defendants' witness Schwarm, found on pages 634, 637, 993 and 689 to 703 of the Transcript. The plaintiff objected and excepted to this evidence (Tr. 701–2) on the ground that the witness could not testify as to the contents of the geological reports without producing them and on the further ground that he was not an expert. The plaintiff relies upon these objections and exceptions.

(b) Even if the evidence of the witness Schwarm were competent, it has no probative value.

(c) As to the evidence of the iron character of these lands the only witness who testified as to their iron character was the witness Schwarm (Tr. 690) and the Master finds on page 98 of his report that this evidence was insufficient to prove their noniron character. The Master reaches his finding as to their noniron character by examining certain publications listed on pages 98 to 101 of the report which were not offered in evidence, of which the Master could not take judicial notice, and which, in any event, do not show the noniron character of these lands.

EXCEPTION NO. X

The plaintiff excepts to the Master's conclusion of law ((a) on page 145) of his report that "The phrase 'agricultural lands' as used in section 3 of the Act of July 2, 1864, is intended to be used in opposition to the phrase, 'mineral lands' and to include all lands not mineral, and not iron, and not coal", and to the Master's conclusion to the same effect in the body of the report (p. 50). Said ruling is erroneous and the same is contrary to law for the reason that the proper meaning of the words "agricultural lands" in said section is the ordinary and accepted meaning of those words, that is, lands which are tillable or capable of cultivation.

EXCEPTION NO. XI

The plaintiff excepts to the conclusion of law ((b) of the Master on page 145) of his report that "The lands described in N. P. exhibits 144, 145, and 146 for which mineral base is assigned are of such character as to be selectable as indemnity for mineral losses", and to the Master's conclusion to the same effect in the body of the report (pp. 58, 59, 97–101). Said conclusion is erroneous for the reason that the Master has found (a) p. 144)

that all except 10,803.17 acres of the said land described in said Exhibits 144 and 146 "are not agricultural lands in the sense that they are tillable". No evidence was introduced to show that the patented lands in N. P. Exhibit 167 (mistakenly referred to as 145) on which mineral base was offered in substitu-
994 tion, were agricultural lands, and, as pointed out in Exception No. IX, there was no competent evidence tending to show their noncoal or noniron character, either now, or at date of selection or patent. The Master was in error in construing the words "agriculture lands" as meaning "non-mineral lands."

ABSAROKA AND BEARTOOTH FORESTS

EXCEPTION NO. XII

The plaintiff excepts to the conclusion of law of the Master on page 145 of his report that "Said lands are subject to the same rules as may apply to other withdrawn lands, within the principle of the Forest Reserve case," and his conclusion of law on page 64 of his report that these "lands became subject to selection when they ceased to be a part of the Crow Indian Reservation, and are as much within the rule of the Forest Reserve case as any other indemnity lands." Said conclusions are erroneous for the reason that

(a) These lands were not comprehended in the grant but they were reserved lands at the time the Company definitely located its road through them and had been in that status for thirteen years.

(b) The Government had the right when it purchased them from the Indians to deal with them as any other public lands not covered by the grant, as conceded by the Master, page 62 of his report. His holding that a vested right arose in favor of the Company is unwarranted. After the lands were purchased from the Indians they did not occupy the same status as if they had never been reserved lands.

(c) No consideration moved from the Company to the Government in purchasing them.

NORTHERN CHEYENNE INDIAN RESERVATION

EXCEPTION NO. XIII

The plaintiff excepts to the Master's finding of fact ((b) on page 146) of his report that "The lands, when so reserved, were unoccupied and unappropriated public lands," for the reason there is no evidence to support this finding.

EXCEPTION NO. XIV

The plaintiff excepts to the Master's failure to find as requested in its request for finding of fact No. 33 as follows:

That there is no evidence from which the Master can find that these lands were unappropriated or unoccupied lands at the time the reservation was created in 1900 or at any other time.

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EXCEPTION NO. XV

The plaintiff excepts to the Master's conclusion of law on page 146 of his report that "Northern Cheyenne Indian Reservation is a Government reservation within the meaning of Section 1 of the Act of June 25, 1929, and the lands therein are therefore governed by the same rules as may apply to lands within national forests and other Government reservations," for the said conclusion is erroneous for the following reasons:

(a) This reservation was not a Government reservation within the meaning of the Act of June 25, 1929, which means a reservation owned by the Government.

(b) As set forth in the Master's report, page 66, Congress by the Act of June 3, 1926, enacted that this Indian reservation "be and the same is hereby, declared to be the property of said Indians," and directed the allotment of the agricultural and grazing lands to the Indians. At that time there were approximately 1,408 Indians on the reservation which contained 489,500 acres (Senate Report No. 638, dated April 19, 1926, 69th Congress, 1st Session). Pursuant to said Act 1,547 allotments aggregating 233,120 acres were made in severalty to said Indians (Annual Report of Commissioner of Indian Affairs for 1932, p. 28).

(c) At the date of the passage of the Act of 1929 these lands did not belong to the United States, but they were the property of the Northern Cheyenne Indians numbering about 1,500 who were living on these lands.

SUBSTITUTION OF BASE

EXCEPTION NO. XVI

The plaintiff excepts to the Master's finding, both in the formal finding ((b) p. 147) and in the body of the report (pp. 77–79) to the same effect, that "the error (in the printed statute) was discovered in 1904" and that "for something over forty years all concerned understood the published statute to be as enacted and enrolled." (The formal finding implies that the Company lacked

knowledge or notice of the correct provisions of the statute referred to prior to 1904.)

For grounds of such exception, plaintiff says:

(a) That said finding is not supported by any evidence or any fact before the Court.

(b) That said finding is contrary to the undisputed evidence and admitted fact that from very early days the Company had a correct copy of the statute in its possession (testimony of witness Schwarm, Tr. 632),

996 (c) That said finding is contrary to the admitted fact that the mortgages executed by the Company May 1, 1879, and September 1, 1879 (Exhibits G and H attached to the amended bill of complaint) recite the exact language of the statute, including the words "and within fifty miles thereof."

(d) That said finding is contrary to the undisputed facts disclosed by the testimony of the witness Schwarm (Tr. 942 to 943a) that the patented lands in respect to which substitution of base is now being sought, were originally selected by the Company between 1883 and 1897, the bulk of them being selected in 1883, 1885, and 1887, when the circumstances and terms of the grant were presumably well known to and fresh in the minds of the Company's agents.

(e) That said finding is contrary to facts of which the Court may take judicial notice, including the facts that the statute was enacted at the solicitation of the incorporators of the Company, and that the Congressional proceedings (Congressional Globe, July 1, 1864, 38th Cong., 1st Sess., p. 3459, p. 3479; Cong. Globe, April 20, 1870, 41st Cong., 2d Sess., p. 2842) disclosed its true language.

(f) That said finding is contrary to the rule that the Company was, as a matter of law, chargeable with knowledge and notice of the terms of the statute.

(g) That said finding is contrary to the other findings of the Master:

1. That "in the very early days the company had a correct copy of the statute" (p. 78); and

2. That there is no evidence of what knowledge or lack of knowledge the Company had, as disclosed by the Master's recital that "as the years went by, those having to do with the grant left the employ of the Company, and are all now dead," (p. 78), and "Of course, what form the copy Mr. Schwarm refers to was in, where it was kept, what, if any, use was made of it at the time, is not disclosed by the evidence and after all the years could not possibly be shown" (p. 79).

EXCEPTION NO. XVII

The plaintiff excepts to the Master's finding both in the formal findings ((c) p. 147), and in the body of the report (pp. 77, 79, and 80) to the same effect, that "Both the company and the officials of the Department of the Interior assumed the printed statute to be correct and that, therefore, indemnity for mineral losses could be selected without limit of distance from the line of the road."

997 For grounds of such exception, plaintiff says:

(a) The finding that the Company assumed the printed statute to be correct implies that this assumption was based on lack of knowledge or notice and not upon inadvertence, and therefore said finding is in error for all the reasons set out as grounds for exception to the finding of fact (b), p. 147, in the preceding numbered exception.

(b) The finding that the Company assumed that indemnity for mineral losses could be selected without limit of distance is not supported by any evidence or any fact before the Court.

(c) The finding that the Company assumed that indemnity for mineral losses could be selected without limit of distance is in disregard of the fact, which the Master should have found, that had the statute been enacted as printed, its language or a reasonable construction thereof, would not warrant any assumption that mineral losses could be selected without limit of distance, or within the second indemnity limits.

(d) The finding that the Company assumed that indemnity for mineral losses could be selected without limit of distance is contrary to the other findings of the Master in the body of the report to the effect that no evidence established that any such assumption was in fact made, as disclosed by the Master's recital (p. 79) that "In the nature of things, of course, no direct evidence can be had, as there is no person living who could know the fact."

EXCEPTION NO. XVIII

The plaintiff excepts to the Master's finding, both in the formal findings ((d) p. 147), and in the body of the report (pp. 79 and 80) to the same effect, that "acting upon that supposition the company used its general losses in first indemnity; whereas, but for the mistake, it would have used them in second indemnity, reserving mineral losses for first indemnity; and, therefore, by this mutual mistake the company was misled to its prejudice."

For grounds of such exception, plaintiff says:

(a) That the finding that the Company acted upon the supposition mentioned in using general losses in first indemnity limits is not supported by any evidence or any fact before the Court.

(b) That the finding that the Company so acted is contrary to and disproven by the undisputed facts that when such general losses were used by the Company, settlers were then locating upon first indemnity lands (statement of the Master, Tr. 935); and that mineral losses were small and thought to be small by the Company, which was then asserting its claims in the case of Barden v. Northern Pacific Railroad Company, 154 U. S. 288, and which facts disclose that there can be no reason for inferring that, but for any error in printing, or misapprehension in regard thereto, the Company would have acted otherwise than it did in making selections and assigning base, or would have been advantaged by so doing.

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(c) That the finding that the Company so acted upon such supposition is contrary to the other findings of the Master in the body of the report which disclose that whether, at the time of such action, it would have been to the advantage of the Company to use subsequent losses in second indemnity limits, reserving mineral losses for first indemnity limits, or whether the Company would have considered such action advantageous at the time, is a matter purely of speculation, as disclosed by the Master's recitals that "The company may have thought that its mineral losses would be so small that there would be enough land left in first indemnity to satisfy them when they were established" (p. 89), that it was prosecuting its contentions in the Barden case until 1894 (p. 90), that at the time in question "there were no ascertained mineral losses" (p. 78), and that "There is no evidence that the first indemnity limits were being settled up so fast that the company had to rush its subsequent losses in there to get ahead of settlers" (p. 90), (which implies that there is also no evidence that they were not being so settled up).

(d) That the finding that the Company was misled to its prejudice (and that it was in fact prejudiced by the manner in which its selections were made) is not supported by any evidence or any fact before the Court.

(e) That the finding that the Company was misled to its prejudice, and was so prejudiced, is contrary to the evidence, which discloses that, because of the incoming settlers, and the other facts set out in paragraph (b) of this Exception, it was fully as advantageous for the Company to select indemnity lands as rapidly as possible, using the losses then available, as to have withheld such losses for second indemnity lands.

(f) That the finding that the Company was misled to its prejudice, and was so prejudiced, is contrary to the specific find-

ings in the body of the Master's report which are stated and quoted above in ground numbered (c) for this exception,
999 and which discloses that it is a matter purely of speculation whether the Company did in fact suffer any detriment.

EXCEPTION NO. XIX

The plaintiff excepts to the finding of the Master, both in the formal findings ((e) p. 147), and in the body of the report (p. 73) to the same effect, that "The Secretary of the Interior had permitted * * * substitution of base for reasons which appeared to him, in the exercise of his administrative discretion, to be sufficient," and for ground of such exception says that the facts before the Court show that the only instances where substitution of base was permitted were of the two classes mentioned by the Master (p. 71), namely, "where the selection list was still pending" or "where it (The Department of the Interior) had itself induced an error."

EXCEPTION NO. XX

The plaintiff excepts to the Master's conclusion ((a) p. 147), both as stated in the formal conclusion and in the body of the report (pp. 71 and 74) to the same effect, that "The Secretary of the Interior, in the exercise of administrative discretion, might properly permit or refuse substitution of base, as on occasion he did."

For grounds of such exception, plaintiff says:

(a) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as hereinbefore in these exceptions specified.

(b) The findings of fact as made do not support such conclusion as a matter of law.

(c) The said conclusion that the Secretary of the Interior might properly permit a substitution of base is erroneous and contrary to law in that:

1. The Secretary of the Interior was not and never has been vested with authority to permit substitution of base.

2. Permission to substitute base, as sought by the Company in this case and permitted by the report of the Master, is not authorized by the provisions of the grant, but is contrary thereto.

3. The regulation of the Department of the Interior requiring assignment of base in the selection of indemnity lands (4 L. D. 90, Circular of August 4, 1885), having the force and effect of law, operated to deny any right or authority for substitution or rearrangement of losses after selection and acquisition of indemnity lands by the Company.

EXCEPTION NO. XXI

The plaintiff excepts to the conclusion of the Master,
1000 both as stated in the formal conclusions ((a) p. 147), and in the body of the report (p. 74) to the same effect, that "Likewise the court, in the exercise of judicial discretion, in the application of established principles of equity, may permit or refuse (substitution of base)."

For grounds of such exception, plaintiff says:

(a) The Court is not authorized by the Constitution or laws of the United States or otherwise to permit substitution of base as allowed by the Master.

(b) The said conclusion is contrary to law.

(c) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as hereinbefore in this exceptions specified.

(d) The findings of fact as made do not support such conclusion as a matter of law.

(e) If the Secretary of the Interior ever had any power to grant or deny substitution of base, his participation in the making of any withdrawal that would be invalidated by the granting of substitution of base was, in itself, an exercise of such power in denial of substitution. The withdrawals referred to are listed on pages 103 to 105 of the Master's report.

(f) The Court is not charged with the duty of undertaking a rearrangement or substitution of base for the purpose of awarding the Company the Maximum calculable percentage of the acreage originally within the place limits of the grant, nor is the same, or any part thereof, within the jurisdiction of this Court.

(g) The Court is not vested with any administrative or other power to adjust the grant in the sense in which that term is used by the Master in that part of his report where he recites (p. 74): "I am now of the opinion, therefore, that such adjustment of the grant is committed to this court, with the same power and authority possessed by the Secretary under the previous statute directing him to adjust," as is more particularly specified in Exception No. XXXIX.

(h) There are no allegations in the pleadings warranting or justifying the relief described in this conclusion.

EXCEPTION NO. XXII

The plaintiff excepts to the conclusion of the Master, both as stated in the formal conclusions ((b) p. 147), and in the body of the report (p. 76) to the same effect, that "The maxim that 'He who seeks equity must do equity' requires that the substitution proposed by N. P. exhibit 145 be allowed".

For grounds of such exception, plaintiff says:

1001 (a) Said conclusion is erroneous and contrary to law.

(b) The allowance of such substitution of base is not within the powers of this Court nor authorized by law.

(c) It is the Company which seeks affirmative equitable relief by way of substitution of losses, and the maxim has no application to support such relief.

(d) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as in these exceptions specified.

(e) The findings of fact as made do not support such conclusion as a matter of law.

(f) No allegations of the pleadings warrant the award or allowance of substitution of base.

(g) The Master erroneously admitted in evidence, over the objection of the plaintiff that the same was irrelevant and inadmissible by reason of there being no issue with respect thereto raised by the pleadings and no allegations in the pleadings in support thereof, the N. P. Exhibit 138 and other evidence and testimony offered by the Company in support of its request for substitution of base (Tr. 615 and 616).

(h) The Master erroneously attempts to apply the maxim without giving consideration to the issues of fraud, forfeiture, or breach of contract on the part of the Company, or any other equity militating against the Company.

(i) Said conclusion is erroneous for all the reasons set forth as grounds of exception No. XXI.

EXCEPTION NO. XXIII

The plaintiff excepts to the conclusion of the Master, both as stated in the formal conclusions ((c) p. 148) and in the body of the report (pp. 80–82) to the same effect, that "The mutual mistake as to the terms of the mineral-indemnity proviso was not a mistake of law, but of fact, and is therefore correctible."

For grounds of such exception, plaintiff says:

(a) Said conclusion is erroneous and contrary to law.

(b) The allowance of substitution of base, under the guise of correction of a mistake or otherwise, is not within the powers of this Court nor authorized by law.

(c) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as in these exceptions specified.

(d) The findings of fact as made do not support such conclusion as a matter of law.

1002 (e) The Company has pleaded no matters or facts to warrant such conclusion, nor has it prayed for such relief.

(f) Said conclusion is erroneous for all the reasons set forth as ground of Exception No. XXI.

EXCEPTION NO. XXIV

Plaintiff excepts to the conclusion of the Master, both as stated in the formal conclusions ((d), p. 148), and in the body of the report (p. 93) to the same effect, that "The mistake should be corrected by permitting the company to withdraw its assigned general losses and substitute therefor mineral losses as proposed by said exhibit."

For grounds of such exception, plaintiff says:

(a) Said conclusion is erroneous and contrary to law.

(b) The allowance of such substitution is not within the powers of this Court nor authorized by law.

(c) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as in these exceptions specified.

(d) The findings of fact as made do not support such conclusions as a matter of law.

(e) The Company has pleaded no matters or facts to warrant such conclusion, nor has it prayed for such relief.

(f) Said conclusion is erroneous for all the reasons set forth as grounds of Exception No. XXI.

EXCEPTION NO. XXV

The plaintiff excepts to the conclusions of the Master in relation to substitution of losses, to the effect that "the Court may permit or refuse (substitution of base)" ((a), p. 147), that the equitable maxim quoted "requires that the substitution proposed by N. P. Exhibit 145 be allowed" ((b), p. 147), that the mistake as to the terms of the mineral indemnity is correctible ((c), p. 148), and should be corrected by permitting the Company to withdraw its assigned general losses and substitute therefor mineral losses as proposed by said exhibit ((d), p. 148).

As further grounds for such exception to each and every part of said conclusions, and to all thereof, and by way of further exception to said report and the findings and conclusions thereof relating to substitution of losses, plaintiff says:

1003 (a) Said conclusions and each and all thereof, are erroneous for the reason that the evidence disclosed and required a finding which the Master should have made, that the selection of the greater portion of the lands previously patented

and in respect to which mineral losses are sought to be substituted as base were made prior to 1888 (Testimony of the witness Schwarm, Tr. 942 to 943a), and so close in point of time to the grant as to require an inference of knowledge of the language of the act, and that the facts referred to in Subdivisions (b) and (c) of Exception No. XVI conclusively show such knowledge.

(b) Said conclusions, and each and all thereof, are erroneous for the reason that the evidence disclosed and required a finding which the Master should have made that the Company, by acquiescing in the refusal of the Department of the Interior to permit substitution of base, by taking no appeal from the decision of the Commissioner, while writing the letter of Britton & Gray (Government Exhibit 297), united with the officers of the United States in putting a practical construction upon the provisions of the grant by the conduct of both parties thereto.

(c) Said conclusions, and each and all thereof, are erroneous for the reason that the evidence disclosed and required a finding or conclusion which the Master should have made, that the issuance of patents upon the lands in respect to which the Company now requests that unused base be substituted, and pursuant to selections of the Company assigning base, constituted a completed transaction and an adjudication by the Interior Department as to the Company's right to the land selected upon the basis of the losses assigned which this Court will not modify, change, or disturb.

(d) Said conclusions, and each and all of them, are erroneous for the reason that the evidence disclosed and required a finding or conclusion, which the Master should have made that by participating in the making of any withdrawal that would be invalidated by the granting of substitutions of base, the Secretary of the Interior exercised all powers vested in him in denial of substitution of base.

(e) Said conclusions, and each and all of them, are erroneous for the reason that the evidence disclosed and required a finding or conclusion, which the Master should have made, that the Company in selecting indemnity lands, assigning base therefor, submitting the same to the Department of the Interior for action and securing patents for the lands so selected,
1004 elected to exercise its rights of selection as it did, and that the resultant acquisition of such lands was in each case a completed transaction which neither the Company nor the Court may now modify.

(f) Said conclusions, and each and all of them are erroneous for the reason that the evidence disclosed and required a finding or conclusion, which the Master should have made, that the Com-

pany is barred by its own delay and laches from substituting base or losses, and from procuring such substitution from this Court.

EXCEPTION NO. XXVI

The plaintiff excepts to the conclusions of the Master, both as stated in the formal conclusions ((e), p. 148), and in the body of the report (pp. 88–93) to the same effect, that "The action of the Company in making its several assignments of general losses was not an election, first, because the common-law doctrine of election is not applicable to these selections, and, second, because, if it were, the election was made under a mistake of fact and is not binding."

For grounds of such exception, plaintiff says:

(a) Said conclusion is erroneous and contrary to law.

(b) The evidence before the Master (N. P. Exhibit 167) discloses that the selection of lands acquired by the Company was done and performed by the Company itself, which presented the losses upon which the several selections were based and acquired title to the lands so selected by its own voluntary action and choice of base, and that thereby the Company elected to make selections and utilize base in the accomplishment of completed transactions.

(c) The evidence and other findings of the Master referred to and specified in the grounds of Exceptions Nos. XVI, XVII, and XVIII discloses that no mistake of fact occurred.

(d) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as in these exceptions specified.

(e) The findings of fact do not support such conclusion as a matter of law.

EXCEPTION NO. XXVII

The plaintiff excepts to the conclusion of the Master, as stated in the formal conclusions ((f), p. 148), to the effect that "After denial by the Department of its requests for substitution the company had no remedy, and did not acquiesce in the rejection of its requests."

For grounds of such exception, plaintiff says:

1005 (a) The conclusion that the Company did not acquiesce in such rejection is erroneous and contrary to law.

(b) The failure to take an appeal from the decisions of the Commissioner of the General Land Office (Government Exhibit 295), and the writing of the letter by Britton & Gray (Government Exhibit 297), did, as a matter of law, amount to an acquiescence in the rejection of the request for substitution.

EXCEPTION NO. XXVIII

The plaintiff excepts to the conclusion of the Master, as stated in the formal conclusions ((g), p. 148), that "the letter from Messrs. Britton & Gray did not amount to nor evidence any acquiescence by the company in the general principle of the right of substitution, nor amount to more than a statement by counsel to the Secretary that they would pursue the matter no further before him. It could not have been said that after that letter was written the Company could make of him no further requests for substitution, and it most certainly does not affect the Company's right under the principle that the plaintiff must do equity".

For grounds of such exception, plaintiff says:

(a) Said conclusion is erroneous and contrary to law.

(b) The letter referred to in fact discloses an acquiescence by the Company in the ruling of the Commissioner of the General Land Office, particularly in view of the failure to take an appeal as provided by law.

(c) The equitable principle referred to does not aid the Company in seeking affirmative equitable relief by way of substitutions of losses and therefore does not apply.

(d) The conclusion is contrary to findings of fact (f) and (g) made by the Master on page 147 of the report.

EXCEPTION NO. XXIX

The plaintiff excepts to the failure of the Master to find as requested by plaintiff (plaintiff's request for finding of fact No. 35) "That the claims of the defendants to the patented lands on which defendants now request that unused base be substituted have been adjudicated by the Interior Department, which Adjudications have resulted in the issuance of patents to the Railroad Company or Railway Company, and these proceedings have been acquiesced in by defendants for twenty to fifty years." The reason for this exception is that the testimony of the Witness Schwarm (Tr. 942, 943, and 943a) shows that the lands on which substitution of base is now being asked were originally selected by the Company between 1883 and 1897, the bulk of them being selected in 1883, 1885, and 1887, and that the lands so selected were patented to the Company from 1893 or 1894 up to 1924. N. P. Exhibit 167 shows that the patented lands in the grant of 1864 on which the Company is now asking substitution of base were patented to the Company as indemnity lands from twenty to forty years ago. There is no evidence that the Company has sought to disturb these

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adjudications prior to the trial of this case, except as to approximately fifteen thousand acres of patented lands involved in Bismarck Lists 54 and 56.

EXCEPTION NO. XXX

The plaintiff excepts to the failure of the Master to find as requested by plaintiff (Plaintiff's request for findings of fact No. 36) "That no contention is made in this case that the proceedings in the Interior Department, by which conveyances of the patented lands on which defendants now ask that base be substituted were obtained, are for any reason erroneous or invalid." The reason for this exception is that there is no evidence, nor any statement of counsel appearing in the record or in the briefs on file before the Master, charging that the proceedings in the Interior Department, which resulted in the issuance of patents to lands on which defendants now ask substitution of base are for any reason erroneous or invalid.

EXCEPTION NO. XXXI

Plaintiff excepts to the failure of the Master to find as requested by plaintiff (plaintiff's request for findings of fact No. 37) "That defendants have had most of the substitute losses which they now offer in substitution for original losses for upwards of thirty years and some of them for upwards of fifty years and that they have not, prior to the trial of this case, offered them in substitution except as to approximately fifteen thousand acres of losses involved in Bismarck Lists numbered 54 and 56," and to the Master's conclusion (p. 94) to the effect that the doctrine of laches has no application to prevent substitution of base. The reason for this exception is that N. P. Exhibit 167 shows that some of the losses now offered in substitution are prior losses established by definite location of the road and many of the losses resulted from mineral classification approved in the years 1897 to 1903, inclusive. There is no evidence that these losses were offered in substitution prior to the trial of this case, except as to losses involved in Bismarck Lists 54 and 56. The conclusion that laches is not applicable is contrary to law.

1007 EXCEPTION NO. XXXII

The plaintiff excepts to the failure of the Master to find that the Company has, since January 9, 1915, when the Company's request for substitution of base for indemnity originally offered in Bismarck Lists 54 and 56 was denied, acquiesced in the denial

of such request for substitution of base, which finding the plaintiff requested the Special Master to make in its request No. 38. The reason for this exception is that Government Exhibit 297 shows that the Company acquiesced in the denial of its request for the substitution of base involved in Bismarck Lists 54 and 56 and there is no evidence to the contrary.

EXCEPTION NO. XXXIII

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff in its requested finding of fact No. 39, "That ever since the withdrawal of the second indemnity lands in Montana and Idaho to which defendants in their Exhibit 145 have assigned original losses which they propose shall be released by substitution, the plaintiff has had said lands under administration and has expended large sums of money thereon for preservation, development and protection of said lands." The reason for this exception is that in Subdivisions XXI and XXXVII of plaintiff's amended bill of complaint these facts are alleged and they are, in substance, admitted in Subdivisions XXI and XXXVII of plaintiff's amended bill of complaint these facts are alleged and they are, in substance, admitted in Subdivisions XXI and XXXVII of the Company's amended answer.

EXCEPTION NO. XXXIV

The plaintiff excepts to the failure of the Master to find, as requested in plaintiff's requested finding of fact No. 40, "That there is no proof in this case showing that the patented lands which have heretofore been obtained by defendants by use of Montana or Idaho subsequent base and on which defendants now request that they be permitted to substitute mineral base, as shown by defendants' Exhibit 145, are now or were, at the time said lands were patented, agricultural lands." The reason for this exception is that the record does not contain any proof justifying a finding that the patented lands on which defendants' request that the Court allow substitution of mineral base are now, or were at the time they were patented, agricultural lands.

EXCEPTION NO. XXXV

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff in its requested finding of fact No. 41,

"That the proof in this case is wholly inadequate to show
1008 that the patented lands which were obtained by defendants by use of Montana or Idaho subsequent base and on which

defendants now request that they be permitted to substitute mineral base are now, or were, at the dates said lands were selected or patented, non-coal and non-iron lands.". The reasons for this exception are:

(a) That there is no competent proof justifying a finding that such patented lands are now, or were, at the times they were selected or patented, noncoal lands; and

(b) There is no proof in the record that such lands are now, or were, at the times they were selected or patented, noniron lands, all as pointed out in Exception No. IX.

EXCEPTION NO. XXXVI

The plaintiff excepts to the rulings of the Master admitting in evidence defendants' testimony and exhibits in support of their request for substitution of base over the objection of the plaintiff that defendants did not allege facts entitling them to substitution of base, or pray for relief of that kind, and, further, that they have no right as a matter of law to substitution of base. The ruling upon the admission of defendants' Exhibit 138, being their first substitution exhibit, appears at pages 615 and 616 of the transcript of evidence. The objection was further urged as to all the proof offered by defendants in support of their request for substitution, as shown at pages 629, 630, 657, 715, 717, 729, and 802 of the transcript of evidence.

The admission of the evidence was erroneous for the following reasons:

(a) Defendants did not plead any facts entitling them to substitution of base nor did they make any request in their pleadings that they be allowed to substitute base.

(b) Defendants have no right in law or equity to substitution of base.

EXCEPTION NO. XXXVII

The plaintiff excepts to the Master's findings and conclusions with respect to substitution of losses, and particularly to the conclusion that the Company should be permitted to substitute losses as proposed in N. P. Exhibit 145, for the reason that the Master's report and conclusions that such substitution of losses should be permitted amounts to the awarding to the Company of affirmative equitable relief, and plaintiff says that upon the hearing heretofore had before the Master resulting in a report and findings upon other issues previously submitted to the Master by the Court and which report was confirmed by
1009 the Court by an order or decree dated October 3, 1935, as amended January 29, 1936, the Company disclaimed any

demand or request for affirmative or equitable relief. The former report of the Master referred to, as respects the plaintiff's then contention with respect to the issues of fraud, forfeiture, breach of contract on the part of the Company, and other issues raised by the original bill of complaint, and to the effect that such issues should be heard and determined by the Court by reason of the equitable maxim that "he who comes into equity, must come with clean hands," was based and founded upon such disclaimer by the Company, and plaintiff says that by reason thereof the Company cannot now claim nor the Master award such affirmative equitable relief nor permit or allow substitution of losses as is done in such report.

EXCEPTION NO. XXXVIII

The plaintiff excepts to the Master's findings and conclusions with respect to substitution of losses, and particularly to the conclusion that the Company should be permitted to substitute losses as proposed in N. P. Exhibit 145, and as ground of this exception says:

By order or decree dated October 3, 1935, as amended January 29, 1936, the Court confirmed a former report of the Master dated May 31, 1933, relating to certain of the issues in this suit. Reference to such report and decree will disclose that certain matters set out in the original bill of complaint tendered issues for the purpose of depriving the Company of relief herein under the maxim that "he who comes into equity must come with clean hands." Such report discloses that among the issues so tendered were the following:

(a) That the mineral losses now sought to be utilized as a basis for the request of substitution came into existence through the fraud and misconduct of the Company.

(b) That the company was in default in the performance of the terms of the grant in the particulars set forth in the bill, and was therefore barred from relief in this suit.

By such report and decree such issues were eliminated from the suit upon the ground that no affirmative relief was sought by the Company and that it was therefore not an actor in the suit, and hence the maxim quoted did not apply. (See former report, pp. 30, 31.)

By purporting to grant the Company substitution of losses upon the theory that the same is proper affirmative equitable relief, the Master now discloses a situation in which the
1010 Company is an actor, seeking affirmative relief, and subject to the application of the "clean hands" rule.

The Court ought not to sustain the findings and conclusions awarding the Company such relief, after having foreclosed plaintiff from proving equities which would operate to deny such relief under the maxim quoted.

EXCEPTION NO. XXXIX

The plaintiff excepts to the conclusion of law of the Master contained in the body of the report and stated in the language beginning with the third sentence on page 74 and concluding with the second sentence on page 75, and summarized in the words (p. 74): "I am now of the opinion, therefore, that such adjustment of the grant is committed to this court, with the same power and authority possessed by the Secretary under the previous statute directing him to adjust," and to the Master's determination pursuant thereto that the grant should be adjusted by the process of permitting substitution of losses.

Plaintiff says that said conclusion and determination are erroneous for that:

(a) It is an erroneous construction of the Act of June 25, 1929, which confers no such power on this Court.

(b) It assumes a power in this Court which would be administrative or legislative in character and not within the judicial power conferred upon this Court by section 1 of Article III of the Constitution of the United States and defined in section 2 of said Article. Said Act of June 25, 1929, could not under the limitations of said section 2 confer upon this Court power to revise, review, or otherwise deal with administrative decisions, or to exercise administrative or legislative powers, and should not be construed to attempt to do so.

AVAILABILITY OF WITHDRAWN LANDS FOR INDEMNITY SELECTIONS

EXCEPTION NO. XL

The plaintiff excepts to the Master's finding (c), page 149 of the report, that "On December 31, 1935, counting withdrawn lands, whether surveyed or unsurveyed, but excluding mineral, there was an excess of approximately 24,000 acres" and to his statements to the same effect in the body of his report (pp. 106, 116, and 118), for the following reasons:

(a) The finding is erroneous in that it combines all losses, whether prior, subsequent, or mineral losses, for comparison with withdrawn lands without regard to whether said lands are within the first indemnity limits, second indemnity limits, or mineral indemnity limits, and does not make any differentiation between the character of the losses or the location of the lands.

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(b) If the theory on which the finding is made were correct, the finding itself is erroneous in that it is not supported by the evidence in the following particulars:

1. The excess of approximately 24,000 acres is arrived at by assuming the total area withdrawn in the indemnity limits of the grant of 1864, as shown by plaintiff's Exhibits 110 to 188, inclusive, and 152A, 161A, 184A, 184AA, 184B, 110A, 111A, 111B, 188A, 188B, and 188C to be 2,369,027.95 acres, and by deducting therefrom 30,000 acres of non-mineral lands in the second indemnity belts in Idaho, 3,300.82 acres of Fort Ellis lands in Montana, and 92,276.70 acres of withdrawn lands conceded to be mineral, whereas the lands in the item of 3,300.82 acres and the lands in the item of 92,276.70 acres are not included in the area shown on said exhibits, but have already been eliminated therefrom and the correct area of the withdrawn lands as shown by the said exhibits is 2,363,901.34 acres which exceeds the area of the deficiency in the grant of 1864, as found by the Master (2,220,224.17 acres) by 143,677.17 acres. If the item of approximately 30,000 acres in the second indemnity limits in Idaho is deducted, the excess of all withdrawn lands over all losses would still be 113,677.17 acres instead of approximately 24,000 acres as found by the Master.

2. The tabulations appearing on pages 103 to 105 of the Master's report are erroneous in these respects:

(a) The area of 4,046.05 acres shown as being in Government Exhibit 126 is included in the area of 42,252.01 acres shown in Government Exhibit 123.

(b) The area of 1,825.56 acres shown as being in Government Exhibit 129 should be 2,225.56 acres.

(c) The item of 37,512.90 acres shown as being in Government Exhibit 147 should be 37,511.80 acres.

(d) The item of 4,682.17 acres shown as being in Government Exhibit 161A should be 4,682.71 acres.

1012 (e) The item of 120 acres shown as being in Government Exhibit 177 should be omitted.

(f) The item of 1,360 acres shown as being in Government Exhibit 180 should be omitted because it is also included in the item of 5,909.68 acres shown in Government Exhibit 182.

(g) All footings should be corrected to reflect these changes.

EXCEPTION NO. XLI

The plaintiff excepts to that part of the Master's conclusion (a), page 149 of his report, wherein he states that "In determining, therefore, whether the lands in indemnity limits were sufficient to supply the losses, neither mineral nor unsurveyed lands should be counted" and also the Master's conclusion to the same

effect on page 112 of the body of his report, for the following reasons:

(a) The Master's conclusion is contrary to law.

(b) The Master's conclusion is erroneous in that he should have concluded that lands in the indemnity limits, which were unsurveyed at the time of any given withdrawal, should be counted in determining the validity of such withdrawal.

(c) The conclusion is erroneous in that the Master should have concluded that lands, which, subsequent to the date of any given withdrawal, were found to be mineral in character, should have been counted in determining the validity of such withdrawal.

EXCEPTION NO. XLII

The plaintiff excepts to the Master's conclusion (b), page 149 of the report, wherein he says "All the withdrawals listed in Govt. Exhibits 110, 111, 113 to 188, both inclusive, 152A, 161A, 184A, 184AA, 184B, 110A, 111B, 188A, 188B and 188C were invalid and ineffective as against the indemnity selection rights of the defendants, except as to 3,300.82 acres of abandoned Fort Ellis lands" and to the Master's conclusion to the same effect in the body of his report (p. 117). (The plaintiff does not except to the conclusions of the Master as to the item of 3,300.82 acres of abandoned Fort Ellis reservation lands). The reasons for this exception are as follows:

(a) The Master's conclusion is contrary to law.

(b) The Master's conclusion is founded on erroneous findings of fact as pointed out in these exceptions.

(c) In making his computation of the area of public
1013 land remaining in the indemnity belts, after the respective withdrawals were made, for the purpose of determining the validity of such withdrawals, the Master erroneously failed to include unsurveyed lands in the indemnity limits of the grant.

(d) In computing the area of vacant public lands remaining in the indemnity limits after the respective withdrawals under consideration were made, for the purpose of determining the validity of such withdrawals, the Master erroneously failed to include lands classified as mineral subsequent to the date of such withdrawals.

(e) In any event the conclusion is erroneous for the reasons stated in Exception No. XLVIII.

EXCEPTION NO. XLIII

The plaintiff excepts to the Master's conclusion (c), page 150 of his report, that the "Northern Pacific Railway Company may designate and have compensation under the act of July 25, 1929,

for all such withdrawn lands, with the exception just noted, to the extent of the deficiency as found, save that in second indemnity limits in Idaho it may not select, including valid selections heretofore made in said limits, more than the quantity of its subsequent losses in Idaho, and save that it may not select lands conceded to be mineral", and to the Master's conclusion to the same effect in the body of his report (pp. 116 and 117), for the following reasons:

(a) The conclusion is contrary to law.

(b) The conclusion is based on erroneous findings of fact and conclusions of law, more particularly set forth and excepted to in these exceptions.

(c) There is no evidence that the lands described in defendants' Exhibits 144 and 146 to which mineral base is assigned are "unoccupied and unappropriated agricultural lands", whereas, the undisputed evidence (Tr. 1106 to 1379) shows that such lands are not agricultural lands, except as to 10,803.17 acres thereof, as is more particularly set forth in plaintiff's Exceptions numbered VIII, X and XI hereof which are adopted and made a part of this exception, and as is further shown by the Master's finding (a) on page 144. Therefore, the Company is not entitled to compensation for such lands.

(d) There is no evidence that the Railway Company has unused losses of the character assignable to all the lands in the second indemnity limits of the States of Montana or Idaho, but on
1014 the contrary the evidence shows that the Railway Company does not have in excess of 112,676.52 acres of unused losses satisfiable in the second indemnity limits of Montana (See Govt. Exhibit 91) and does not have in excess of 21,867.58 acres of unused losses satisfiable in the second indemnity limits of Idaho (See Government Exhibit 96), whereas the withdrawn lands above referred to in the second indemnity limits of those States, respectively, very greatly exceed such unused losses (p. 103). The unused losses here mentioned are the only losses available upon which the Company may base a claim for such withdrawn lands, for the reason that substitution of losses is not permissible, and this for all of the reasons set forth in Exceptions Nos. XVI to XXXIX, inclusive, all of which are hereby made additional grounds for this exception.

(e) The conclusion is erroneous for that the Northern Pacific Railway Company may not have compensation for withdrawn lands in the Absaroka and Beartooth National Forests for the reasons more particularly stated in plaintiff's Exception No. XII which exception is, by reference, made a part of this exception.

(f) The conclusion is erroneous for that the Northern Pacific Railway Company may not have compensation for withdrawn

lands in the Northern Cheyenne Indian Reservation for the reasons more particularly stated in plaintiff's Exceptions numbered XIII and XV.

(g) The conclusion is erroneous for that the Company may not have compensation for 3,710.31 acres of lands in the indemnity limits (described in Government Exhibit 288), which were entered by settlers prior to June 5, 1924, and subsequently patented to them, for the reasons more particularly set out in Exception numbered LIV which is adopted and made a part of this exception.

(h) The conclusion is erroneous for the following reasons: It appears from Government Exhibits 298, 299, and 300 that 47,686.41 acres of the land which the Master found are mineral are in the Absaroka and Beartooth Forests in the place limits of the grant of 1864. It also appears from Government Exhibit 298 that 43,869.41 acres of these lands were used by the Company as subsequent losses to obtain lands in the second indemnity belt in Montana. An examination of Government Exhibits 299 and 300 and N. P. Exhibit 145 and the report of the Master (p. 101)
1015 will disclose that he held that 1,600 acres of these 47,686.41 acres could be released and used as subsequent losses to obtain land in the second indemnity belt in Montana. Likewise the Master rules that the balance of 2,217 acres of these lands could be assigned as unused base to obtain lands in the second indemnity belt in Montana. To such rulings of the Master the plaintiff excepts for the reason that such lands being mineral loss may not constitute base for second indemnity.

(i) This conclusion is based upon all other conclusions relating to the deficiency at the dates of the several withdrawals, the quantity of lands in the several indemnity limits, the character of losses available for use, and the availability of indemnity land for selection. A rejection of any of such conclusions will require a different conclusion than the one here excepted to, and for that reason, plaintiff says that all grounds herein specified for exception to such other conclusions, are reasons why this conclusion is erroneous.

EXCEPTION NO. XLIV

The plaintiff excepts to the Master's conclusion (d) (p. 150), that "In designating land for which it claims compensation, the railway need not specify a particular loss in place for each indemnity tract for which compensation is claimed", and to the conclusion to the same effect in the body of the Master's report (pp. 117 and 119). This conclusion is erroneous for the following reasons:

(a) It disregards the provisions of the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, relative to the selection of indemnity lands and disregards the different kinds of losses and the different indemnity limits to which they may be assigned.

(b) It is contrary to law.

EXCEPTION NO. XLV

The plaintiff excepts to the Master's failure to find, as requested by plaintiff in its request for finding of fact No. 10, that "All withdrawals by the plaintiff of public lands in the second indemnity belts in Montana made prior to December 31, 1903, were made at times when there remained in said belts more vacant public land than was required to satisfy the unused subsequent losses existing at the respective dates of such withdrawals", for the following reasons:

(a) Plaintiff's Exhibit No. 91 shows that all with-
1016 drawals in the second indemnity belts in Montana, made prior to December 31, 1903, were made at times when there remained in said belts more vacant public land than was required to satisfy the unused losses satisfiable in said belts and this fact is also shown by the uncontradicted testimony of the witness Barber (Tr. 550 to 553).

(b) There is no evidence to the contrary.

EXCEPTION NO. XLVI

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff (No. 12), that "All withdrawals by the plaintiff of public lands in the second indemnity belts in Idaho, made prior to December 31, 1905, were made at times when there remained in said belts more vacant public lands than were required to satisfy the unused subsequent losses existing at the respective dates of such withdrawals", for the following reasons:

(a) Plaintiff's Exhibit 96 shows that at the times of all the respective withdrawals made prior to December 31, 1905, the vacant public lands in the second-indemnity belts in Idaho exceeded the unused losses satisfiable in said indemnity belts. This is also shown by the witness Barber (Tr. 169 and 170).

(b) There is no evidence to the contrary.

EXCEPTION NO. XLVII

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff (No. 13) that "After the withdrawal on March 1, 1898, of 163,280 acres in the second-indemnity belt in

Idaho, as shown by Government Exhibit No. 96, there remained 270,583.37 acres of vacant public land in said belt of which 25,500.72 acres were surveyed, and that the unused subsequent losses satisfiable in said belt at the time of said withdrawal aggregated 30,879.76 acres." The reasons for this exception are as follows:

(a) Plaintiff's exhibit 96 shows that after the withdrawals on March 1, 1898, of 163,280.00 acres in the second-indemnity belts in Idaho there remained 270,583.37 acres of vacant public land in said belts and that the unused losses at the end of the year were 30,879.76 acres and at the end of the previous year 58,180.65 acres, and plaintiff's Exhibit 95 shows that of the 270,583.37 acres of vacant land in said belts at the end of the year 25,500.72 acres were surveyed.

(b) The proof referred to in (a) of this exception is not disputed and there is no evidence to the contrary.

1017 (c) Even if the Master should have been of the opinion that unsurveyed vacant public lands in said indemnity belts on the date of such withdrawal should not be counted in computing the amount remaining for the satisfaction of losses satisfiable in said belts, he should have found that said withdrawals of March 1, 1898, were valid except as to 5,379.04 acres, the difference between 30,879.76 acres and 25,500.72 acres.

EXCEPTION NO. XLVIII

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff (No. 14), that "On March 21, 1905, the Government withdrew for forest purposes 108,683.73 acres of land in the second-indemnity limits in Idaho as shown in Government Exhibit 96; that after such withdrawal was made there remained in the second-indemnity limits in Idaho 46,560.67 acres of vacant public lands, of which 44,073.15 acres were surveyed as shown by Government Exhibit 95; that the unused subsequent losses in Idaho at the time said withdrawal was made were 29,576.25 acres as shown on Government Exhibit No. 96; that after said withdrawal was made the remaining vacant surveyed public lands in the second-indemnity belt in Idaho exceeded the unused subsequent losses by 14,496.90 acres." The reasons for this exception are as follows:

(a) Even if the Master were correct in holding that unsurveyed lands and lands subsequently classified as mineral should not be included in computing the area of vacant public lands within the indemnity limits on the date of said withdrawal of March 21, 1905, for the purpose of determining the validity of

said withdrawal, he should have found the above facts which are shown by plaintiff's Exhibits 95 and 96.

(b) There is no evidence to the contrary.

(Such finding would require a holding that the withdrawal mentioned was valid. The Master has erroneously avoided this necessary holding by allowing substitution of base, and apparently relating it back prior to this withdrawal to invalidate a withdrwal that was otherwise valid.)

EXCEPTION NO. XLIX

The plaintiff excepts to the conclusion of the Master (p. 110 in the body of his report) that the satisfaction of losses "is as though all losses were equally flexible and might be satisfied indiscriminately" and that the several sorts of losses are, in practical effect, interchangeable (p. 117) for the reason that such conclusion is contrary to law.

1018

EXCEPTION NO. L

The plaintiff excepts to the conclusion of the Master (p. 116) in the body of his report, to the effect that the Company's selection rights were, in substance, taken by eminent domain by means of the Act of June 25, 1929. The reasons for this exception are:

(a) The conclusion is contrary to law.

(b) The conclusion is not supported by any proof but is contrary to the facts.

EXCEPTION NO. LI

The plaintiff excepts to the conclusion of the Master (p. 118) that "The excess at present is so small—about 24,000 acres out of 2,244,000—as to bring the case almost within the rule of the Land Office and the courts, that no selection is necessary when all the lands are required to satisfy the deficiency. All are appropriated." The reasons for this exception are:

(a) The conclusion is contrary to the facts as more specifically pointed out in No. XL of these exceptions.

(b) The conclusion is contrary to law.

EXCEPTION NO. LII

The plaintiff excepts to the Master's conclusion of law on page 10 of the body of his report to the effect:

"The language of the resolution authorizing second indemnity limits uses the term 'subsequent to the passage of the act' only

as a measure of the quantity of losses that may be satisfied in second indemnity, not as a definition of the character of those losses. So long as the selections made in second indemnity do not exceed the subsequent losses, both prior and subsequent losses may be satisfied in second indemnity."

For reasons of such exception the plaintiff says:

(a) That such conclusion is contrary to the terms of the grant of July 2, 1864, and of the Resolution of May 31, 1870.

(b) That such conclusion is contrary to the holding of the Land Department that only subsequent losses can be indemnified in second indemnity limits, as pointed out by the Master in the body of his report at page 10.

EXCEPTION NO. LIII

The plaintiff excepts to the Master's conclusion on page 105 in so far as he holds that the amount of second indemnity lands in withdrawals in Idaho which are beyond reach is "about 30,000 acres," in that the amount so beyond reach greatly exceeds 30,000 acres, for the reason that valid withdrawals in Idaho to which attention has been called in Exceptions XLIII, XLVI, XLVII, and XLVIII greatly augment the quantity of lands in Idaho for which no compensation is payable.

1019 LANDS PATENTED TO HOMESTEADERS AFTER WITHDRAWAL

EXCEPTION NO. LIV

The plaintiff excepts to the Master's conclusion of law, page 150 of his report, as to 3,710.31 acres entered under the general homestead laws or by other filings prior to the Act of June 5, 1924, that "Since the withdrawals were invalid, the company should have compensation as though the lands remained in their withdrawn status and had not been patented." This conclusion is erroneous for the reason that as the entries were made prior to June 5, 1924, followed by patents issued to the applicants, the title of the applicants related back to the dates of entry and these lands were not a part of the withdrawals on June 5, 1924, and therefore no compensation therefor, under the terms of the Act of June 25, 1929, can be awarded to the Company.

1,641.27 ACRES IN FORMER FORT ELLIS MILITARY RESERVATION

EXCEPTION NO. LV

The plaintiff excepts to the failure of the Master to find as a fact as requested by the United States in its 45th request for

findings of fact "That 1,641.27 acres in former Fort Ellis Military reservation and referred to on Northern Pacific Exhibit 138 Revised was a mineral loss." The evidence of the Company's witness Schwarm (Tr. 637–638) and N. P. Exhibit 138 Revised show that this land was in the military reservation created November 25, 1873, when the railroad was located opposite this land. In July 1895 the land was classified as mineral by Bozeman Board of Mineral Commissioners, approved by the Secretary of the Interior January 14, 1896, and the Company thereafter used it as a mineral loss to secure, and did secure, patent for lands in place limits in Montana.

EXCEPTION NO. LVI

The plaintiff excepts to the ruling of the Master on pages 69, 71, and 101 of his report that the Company now has the right to treat the loss mentioned in Exception No. LV as a subsequent loss and substitute a mineral loss for it and thereby increase its subsequent losses to that extent.

For grounds for this exception, the plaintiff says:

(a) Such substitution is contrary to law and not within the rights of the Company.

(b) The Master bases such ruling upon his assertion (p. 71), "The government has indicated no objection to these incidental substitutions," which is an error for that the plaintiff requested the finding set forth in Exception LV, cross-examined the witness Schwarm thereon (Tr. 768 to 771), and clearly stated its position at the trial (Tr. 772), and in its printed brief, pages 12–14.

1020

(c) Such loss was treated as a mineral loss (Witness Schwarm, Tr. 770). Selections of place lands were made thereon as such, and such selections approved.

GRANT OF 1870—AUTHORIZATION OF SECOND INDEMNITY LIMITS

EXCEPTION NO. LVII

The plaintiff excepts to the conclusion of the Master on page 150 of his report that "It is concluded the Joint Resolution of May 31, 1870, authorized the laying down of second indemnity limits in Washington in event of deficiency at final location," for the reason said conclusion is erroneous in that the Joint Resolution which authorized a second indemnity belt of ten miles "beyond the limits prescribed in (the) charter," does not authorize such belt opposite the new line from Portland to Puget Sound, the construction of which was authorized by the said Joint Resolution and not by the charter Act of July 2, 1864.

BOTH GRANTS

EXCEPTION NO. LVIII

The plaintiff excepts to the conclusion of the Master (c) on page 150 of his report to the effect that the Northern Pacific Railway Company may designate and have compensation for any withdrawn lands in the grant of 1864, and to the conclusion of the Master (e), page 153, that the Company may designate and have compensation for any withdrawn land in the grant of 1870, and to the conclusions that the withdrawals mentioned were invalid. For grounds of this exception plaintiff says:

(a) The Railroad Company and the Railway Company have breached the contract by which said grants were made in the respects pointed out in plaintiff's amended bill of complaint and have been guilty of fraud and unconscionable conduct in the performance of said contract.

(b) The Company did not construct the road contemplated by the contract, nor was the road as the same was constructed, completed within the time limited in the contract.

1021 (c) Matters and facts alleged in plaintiff's amended bill of complaint show that the Company is not entitled in law or in equity to compensation for any of such withdrawn lands.

Respectfully submitted.

J. CRAWFORD BIGGS,
E. E. DANLY,
NORMAN M. LITTELL,
WALTER L. POPE,
Special Assistants to the Attorney General.

Dated August 13, 1937.

RETURN ON SERVICE OF EXCEPTIONS

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

I hereby certify and return that I served the annexed Exceptions of the United States to the Report of the Special Master filed on July 26, 1937, upon F. J. McKevitt, Solicitor for the Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company, Bankers Trust Company, Guaranty Trust Company, and City Bank Farmers Trust Company; by handing to and leaving a true and correct copy thereof with said F. J. McKevitt personally at Spokane in said District on the 13th day of August 1937.

WAYNE BEZONA,
U. S. Marshal.

[File endorsement omitted.]

1022 In United States District Court

Order on exceptions to master's report

Filed March 22, 1938

This cause came on to be further heard upon the Special Master's report filed therein the 26th day of July 1937, and the Exceptions filed thereto, and after hearing argument, IT WAS ORDERED

(1) That plaintiff's exception numbered XII (relating to the Absaroka and Bear Tooth Forests) be and the same is hereby sustained. To such ruling the defendants except, and their exceptions are allowed.

(2) That plaintiff's exceptions numbered XVI to XXVII, inclusive, XXXVIII and XXXIX (relating to substitution of Base) be and the same are hereby sustained. To such ruling the defendants except, and their exceptions are allowed.

(3) That plaintiff's exceptions numbered XL, XLIV, XLVIII, and XLIX (relating to Availability of Withdrawn Lands for Indemnity Selections) be and the same are hereby sustained. To such ruling the defendants except, and their exceptions are allowed.

(4) That plaintiff's exceptions numbered LV and LVI (relating to 1,641.27 acres in former Fort Ellis Military Reservation) be and the same are hereby sustained. To such ruling the defendants except, and their exceptions are allowed.

(5) That plaintiff's exception numbered XLIII (relating to Availability of Withdrawn Lands) be and the same is hereby sustained, except that subdivisions (c), (f), and (g) and all of subdivision (h) thereof, with the exception of the items of 1,600 acres and 2,217 acres, are hereby overruled. Insofar as by said rulings the exception is sustained defendants except and their exceptions are allowed, and insofar as by said rulings the exception is overruled, plaintiff excepts and its exceptions are allowed.

(6) That Plaintiff's exceptions numbered I, II, IV, and V, and subdivision (a) of exception numbered III (relating to Portage conflict) be and the same are hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

Pending disposition of the amended motion to re-refer, ruling on subdivisions (b), (c), and (d) of exception numbered III is reserved.

(7) That plaintiff's exception numbered VI (relating to Quantity of Deficiency) be and the same is hereby overruled.
1023 To such ruling the plaintiff excepts, and its exceptions are allowed.

(8) That plaintiff's exceptions numbered VII to XI inclusive (relating to Agricultural Lands) be and the same are hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(9) That plaintiff's exceptions numbered XIII to XV inclusive (relating to Northern Cheyenne Indian Reservation) be and the same are hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(10) That plaintiff's exception numbered XLI be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(11) That plaintiff's exception numbered XLII be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(12) That plaintiff's exception numbered XLV be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(13) That plaintiff's exception numbered XLVI be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(14) That plaintiff's exception numbered XLVII be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(15) That plaintiff's exception numbered L be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(16) That plaintiff's exception numbered LII be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(17) That plaintiff's exception numbered LIV (relating to Lands Patented to Homesteaders after withdrawal) be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(18) That plaintiff's exception numbered LVII (relating to Authorization of Second Indemnity Limits) be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

1024 (19) That plaintiff's exception numbered LVIII be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(20) The exceptions of the plaintiff numbered LI and LIII having been withdrawn by the plaintiff, it is unnecessary to consider them.

(21) The exceptions of the plaintiff numbered XXVIII to XXXVII, inclusive, remain undisposed of because, in view of the

other rulings upon exceptions of the plaintiff relating to substitution of base, it is unnecessary to consider them.

(22) That defendants' exception numbered I be and the same is hereby overruled. To such ruling the defendants except, and their exceptions are allowed.

(23) That defendants' exception numbered II be and the same is hereby overruled. To such ruling the defendants except, and their exceptions are allowed.

(24) That defendants' exception numbered III be and the same is hereby overruled. To such ruling the defendants except, and their exceptions are allowed.

(25) That defendants' exception numbered IV be and the same is hereby overruled. To such ruling the defendants except, and their exceptions are allowed.

(26) That defendants' supplemental exception numbered I be and the same is hereby sustained.

(27) That defendants' supplemental exception numbered II be and the same is hereby sustained.

It further appearing to the court that there are additional matters connected with such report of the Master, which are yet to be considered and determined by the Court before the review of said report may be completed, and that for the purpose of completing the review of said report of the Master and in order to enter an order or decree of this Court upon such review as required by the Act of June 25, 1929, and from which order or decree an appeal is authorized by the Act of May 22, 1936, it is necessary that the Court make such Findings of Fact and Conclusions of Law as the Court's review of said Master's report may require;

1025 It is ordered that the parties hereto submit to the Court their proposed Findings of Fact and Conclusions of Law, together with their suggested draft or drafts of such order or decree.

Dated this 22nd day of March 1938.

J. STANLEY WEBSTER,
District Judge.

Approved as to form:

J. CRAWFORD BIGGS,
E. E. DANLY,
WALTER L. POPE,
Solicitors for Plaintiff.

L. B. DAPONTE,
D. R. FROST,
F. J. MCKEVITT,
Solicitors for Defendants.

[File endorsement omitted.]

1026 In United States District Court

Motion by plaintiff for leave to amend bill of complaint

Filed Feb. 5, 1937

Pursuant to notice of the plaintiff's intention to amend its bill of complaint in the particulars hereinafter set forth, given to the defendants on January 9, 1937, the plaintiff hereby moves the Court for leave to amend Exhibits O and Q attached to the amended bill of complaint in the following respects:

By striking out, first, all that part of pages 200 and 201 of the printed copy of Exhibit O which describes lands withdrawn for the purpose of Indian Reservation on March 19, 1900, and lying within the second indemnity limits of the grant of July 2, 1864, and, secondly, all that part of page 239 of the printed copy of Exhibit Q which describes lands withdrawn for the purpose of Indian Reservation on March 19, 1900, lying within the first indemnity limits of the grant of July 2, 1864.

Respectfully submitted.

NORMAN M. LITTELL,
E. E. DANLY,
J. CRAWFORD BIGGS,
Special Assistants to the Attorney General.

[File endorsement omitted.]

1027 In United States District Court

(Marked—N. P. Ex. "A-1" hearing 6/29/39.)

Stipulation relative to defendants' motion to re-refer and amendment to bill of complaint

Filed July 26, 1938

It is stipulated between counsel for the respective parties as follows:

I

That, pursuant to defendants' motion to re-refer for making certain proof concerning non-coal and non-iron character of lands selected with Portage base held invalid by the court, such proof may be made by the affidavit of Verner A. Gilles, copy of which shall be received in evidence as a part of the record in this cause and plaintiff will not question the sufficiency nor controvert such proof of non-coal and non-iron character of said lands.

II

It is further stipulated that the amended complaint may be treated and considered as further amended as follows:

First: By inserting therein following subdivision XXV a new and additional subdivision to be designated subdivision "XXV A" reading as follows:

"That on May 7, 1868, a reservation was created in the then Territory of Montana for the Crow Indians; that thereafter, to wit, on June 27, 1881, while said Indian Reservation was in full force and effect, a portion of the route of the Northern Pacific Railroad in Montana was definitely located through said Reservation; that the lands within said Reservation and embraced within the primary limits of the grant to said Northern Pacific Railroad Company were, under the provisions of the granting act, excepted from said grant; that thereafter, to wit, on April 11, 1882, a part of the lands within said Reservation were purchased by the plaintiff from the Indians and said lands were ceded by said Indians to the United States; that thereafter the Northern Pacific Railway Company filed selection lists in plaintiff's Land Offices, thereby selecting 67,675.49 acres of the land so purchased by the plaintiff and within said primary limits, assigning as base for the selection of such lands other lands within the primary limits of the grant which were found to be mineral in character and were therefore excepted from the grant; the numerical descriptions of the lands so selected are set forth in tabulations hereto attached and marked Exhibits FF1 and FF2; that thereafter the officers and agents of the Interior Department of the United States, without any authority of law so to do, and through inadvertence, error, and mistake, erroneously issued and delivered to the said Railway Company patents covering 63,295.02 acres of the land so selected, leaving unpatented 4,380.47 acres of said selected lands; that the execution and delivery of said patents were without any authority of law, and said patents were and are void, all of which was at all times known to said Companies; that upon the issuance by the United States of the said patents, and by virtue thereof, the said Railway Company assumed the complete ownership of said lands, including the right of possession thereof and all the rights usually attaching to ownership of such lands; that notwithstanding the said patented lands and each and all of them were erroneously and wrongfully obtained from the United States by said Railway Company as herein alleged, said lands have never been reconveyed to the plain-
1028 tiff herein but on the contrary extensive areas of said lands have been sold to third persons; that large sums of money

have been received by the said Railway Company through sales and leases of said lands, all of which moneys, together with interest thereon, rightfully belong to the United States."

Second: By inserting in the prayer of said amended bill of complaint following paragraph (4) thereof on page 99 a new and additional paragraph to be designated "4a" and reading as follows:

"That in the adjustment of said grants the defendant, Northern Pacific Railway Company, be required to account to the plaintiff for the moneys and other values received by it from such of the patented lands referred to in subdivision XXV A of this amended bill as have been sold or disposed of by said Company, together with interest thereon from the respective dates of the receipt of such moneys or values; that said Company be required to account to the plaintiff for the value of such of said patented lands as have not been sold or disposed of by it together with the rental value thereof since said lands were patented to said Company; that plaintiff be adjudged to be the owner of the unpatented lands referred to in Subdivision XXV A, freed of any claim of the defendants thereto, and that the selection lists by which said Company has attempted to select said lands be declared void and that they be cancelled."

III

It is further stipulated that plaintiff may withdraw from the concession which it made during the argument before the Master that certain lands embraced within the area of the Ainsworth and Portland Terminal errors and for which the plaintiff had theretofore asked compensation, might be charged to the grant and that plaintiff may be in the same position it would have been with respect to such lands had that concession not been made.

IV

It is further stipulated that plaintiff may prove the numerical descriptions of the lands involved in the Ainsworth and Portland Terminal errors and the Crow restoration lands by the introduction of evidence in the following manner: A tabulation of the lands which are referred to in this s oulation will be presented by plaintiff to defendants for examination and if found correct will be received in evidence without the necessity of producing any witness to testify thereto. It is further understood that at such time as the parties shall be able to do so, they shall present this stipulation to the court and the questions for decision mentioned in paragraphs II and III will be presented and disposed of as the court shall determine.

1029 V

It is further stipulated that defendants may amend their answer, if so advised, and offer such evidence on the issues made by Paragraphs II, III, and IV of the stipulation as they may be advised is appropriate thereto, and plaintiff may, if so advised, offer rebuttal evidence. Dated July 22, 1938.

WALTER L. POPE (D),
E. E. DANLY,
Solicitors for Plaintiff.

L. B. DAPONTE,
D. R. FROST,
F. J. MCKEVITT,
Solicitors for Defendants.

[File endorsement omitted.]

1030 In United States District Court

Order on stipulation relative to defendants' motion to re-refer and amendment to bill of complaint

Filed Aug. 1, 1938

Upon consideration of stipulation of counsel dated July 22, 1938, it is ordered That the same be and is hereby approved, that the affidavit of Verner A. Gilles is received in evidence and made a part of the record in this cause, that the complaint may be amended as provided in said stipulation, that the plaintiff may withdraw from the concession referred to in said stipulation, and that said stipulation may govern the further proceedings in this cause as therein provided.

Dated Aug. 1st, 1938.

J. STANLEY WEBSTER,
District Judge.

Approved as to form:

———— ————,
————,
Solicitors for Plaintiff.

L. B. DAPONTE,
F. J. MCKEVITT,
Solicitors for Defendants.

[File endorsement omitted.]

1031 In United States District Court

Order approving stipulation

Filed June 26, 1939

There were certain matters connected with the report of the Special Master filed July 26, 1937, that were not determined by the order entered March 22, 1938, upon exceptions to said report. Subsequently, by stipulation filed July 26, 1938, it was agreed that plaintiff be permitted to amend the complaint as set forth in said stipulation, and that defendants be permitted to introduce certain evidence as to non-coal and non-iron character of 291,189.16 acres selected with Portage base held invalid by the Court. Such evidence has been received and plaintiff has withdrawn subdivisions (b), (c), and (d) of its Exception numbered III to the Master's report, making it unnecessary to rule upon that part of said Exception. By stipulation filed June 26, 1939, the parties have disposed of certain matters, including the issues raised by the amendment to the complaint above referred to, and it is unnecessary to determine said issues.

It is therefore ordered that the stipulation filed herein on June 26, 1939, above referred to, be and the same is hereby approved and the plaintiff is permitted to withdraw subdivisions (b), (c), and (d) of its Exception number III to the report of the Special Master filed herein on July 26, 1937.

J. STANLEY WEBSTER,
United States District Judge.

Dated June 26th, 1939.

[File endorsement omitted.]

1032 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Motion to adopt conclusions of law and notice of motion

(Filed June 26, 1939)

The plaintiff moves the court as follows:

1. To make and adopt a conclusion of law to the effect that by reason of the fact, as alleged in both the complaint and the answers herein, and particularly in Subdivision XIV of the amended and supplemental answer of Northern Pacific Railway Company filed herein July 18, 1931, that no line of railroad was

constructed by the Northern Pacific Railroad Company between Wallula, Washington, and Portland, Oregon, and that no such line of railroad was ever definitely located between said points, via the Valley of the Columbia River, a distance of approximately 225 miles, that, therefore, at the time of the withdrawals for governmental purposes in controversy in this suit, the United States had been and was excused from conveying, and was under no obligation to convey, any of the indemnity lands em-
1033 braced within such withdrawals, and that by reason thereof said withdrawals were and are valid, and none of the defendants are entitled to any compensation for any of said lands, or on account thereof.

2. To make and adopt a conclusion of law to the effect that by reason of such failure to locate or construct said line of said road as above stated, the United States has been and is excused from conveying, and is under no obligation to convey or patent to the defendants or any of them, any of the indemnity lands for which patent or a decree for patent is sought by any of the defendants in this suit.

3. To make and adopt a conclusion of law to the effect that, by reason of the fact of the failure to locate or construct said line of said road as above stated, no proof has been or can be made in this suit to support a finding of the invalidity of said withdrawals even if the failure to construct said line of road had not operated to terminate the right of the defendants to further indemnity lands, for the reason and on the ground that had said line of road been located and constructed the additional indemnity areas resulting therefrom might have been sufficient to satisfy all losses at the time of all of said withdrawals, and it is not competent for the defendants to claim, or for the court to find, an invalidity of withdrawals based upon a limitation of the area of the indemnity belts caused by the defendants' own default.

4. To incorporate each of the conclusions of law whereinbefore stated in motions numbered 1, 2, and 3 hereof in the court's findings of fact and conclusions of law to be made and entered by the court pursuant to the last two paragraphs of the court's order of March 22, 1938, on exceptions to the Master's report.

1034 Dated June 19, 1939.

NORMAN M. LITTELL,
Assistant Attorney General.
WALTER L. POPE,
E. E. DANLY,
Special Assistants to the Attorney General.

Notice of motion

To the above-named defendants and to their attorneys of record:

Please take notice, that the undersigned will bring the above motion on for hearing before this Court in the Court Room, United States Courts and Post Office Building, in the City of Spokane, Washington, on the 26th day of June 1939, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

NORMAN M. LITTELL,
Assistant Attorney General.
WALTER L. POPE,
E. E. DANLY,
Special Assistants to the Attorney General.

1035 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Plaintiff's request for additional findings of fact and conclusions of law on Crow losses

Filed June 26, 1939

Comes now the plaintiff in the above-entitled cause and respectfully requests the court to make supplemental findings and conclusions based, in part, on evidence submitted since the filing of the Master's report of July 31, 1937, as follows:

1. That of the total of 2,636,204.53 acres of losses, shown by Government Exhibit 89 as losses in Montana occurring between July 2, 1864 and the dates of definite location of the road in said state, 2,434,082.80 acres were losses within the area of the Crow Indian Reservation, as defined by the Treaty of May 7, 1868.

2. That the area of the Crow Indian Reservation in Montana, as defined by the Treaty of May 7, 1868, was within the Crow Indian area as defined by the Treaty of September 17, 1851.

3. That the area of lands in the second indemnity limits
1036 in Montana which has been heretofore patented to either the Northern Pacific Railroad Company or the Northern Pacific Railway Company under the provisions of the grant of 1864 totals 1,400,934.83.

In harmony with such findings the plaintiff respectfully requests the court to conclude, as a matter of law, as follows:

1. That the losses within the area of the Crow Reservation, as defined by the Treaty of May 7, 1868, are prior losses and not subsequent losses and the combined area of the lands in second in-

demnity limits in Montana, which have heretofore been received by the Northern Pacific Railroad Company and Northern Pacific Railway Company, greatly exceeds the subsequent losses in that state.

2. That none of the defendants are entitled to compensation for or on account of any of the withdrawn lands in the second indemnity limits in Montana, involved in the above-entitled suit.

3. That none of the defendants are entitled to patents to any additional lands of the plaintiff in the second indemnity limits in Montana, involved in the above-entitled suit.

4. That the plaintiff is entitled to have its title to all lands in the second indemnity limits in Montana, involved in said suit, quieted in it against the claims of the defendants and each and all of them.

As reasons for such request the plaintiff states that under the provisions of the Joint Resolution of May 31, 1870, the amount of lands in the second indemnity limits in any state which the company may be entitled to receive is limited to the amount of the losses in the primary limits in such state, occurring between July 2, 1864 and the respective dates of definite location of
1037 the road in such state and, inasmuch as the Crow Reservation losses are prior losses and not subsequent losses and the lands already received by the companies in the second indemnity limits in Montana greatly exceed the losses in such state occurring subsequent to July 2, 1864, the defendants are not entitled to patents to or compensation on account of any additional lands in said limits.

NORMAN M. LITTELL,
Assistant Attorney General.
WALTER L. POPE,
E. E. DANLY,
Special Assistants to the Attorney General.

1038 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Plaintiff's request for additional findings of fact and conclusions of law (on right to compensation)

Filed June 26, 1939

Comes now the plaintiff and requests and moves the Court to make and adopt each of the following findings of fact:

1. The Court finds that there is no evidence before it that any of the lands comprehended within the several withdrawals in-

volved in the suit would have been obtained by the defendants, or any of them, if said withdrawals had not been made.

2. The Court finds that there is no evidence before it that any of the withdrawals operated to lessen or diminish the amount of lands which the defendants would have received had such withdrawals not been made.

3. The Court finds that there is no evidence before it as
1039 to which of the withdrawn lands, if any, or what amount of lands the defendants, or any of them, would have obtained had such withdrawals not been made.

4. The Court finds that there is no evidence before it that the acts and things done and performed by the plaintiff in the administration of the grants, taken singly, or as a whole, resulted in the defendants receiving a less amount of lands than defendants were entitled to, or would have received, had there been no errors in the administration of such grants.

And plaintiff requests and moves the Court, in conjunction therewith, to adopt a conclusion to the effect that defendants are not entitled to any compensation in this suit.

The grounds for asking the foregoing action of the Court are as follows:

Requested findings 1, 2, and 3 should each be made for the reason that since the withdrawn lands could only be selected when surveyed, and since these lands, if not withdrawn, would also have been available for acquisition under the public land laws, it is a matter of pure speculation whether any, or if any, what withdrawn lands would have been obtained by the defendants had such withdrawals not been made.

Requested finding 4 should be made for the same reason, and also for the added reason that by the illegal withdrawals mentioned in subdivision XXXII of the amended complaint there occurred errors in the administration of the grant which resulted in the defendants receiving lands they would not otherwise have had, and the latter lands are not shown to be less in amount than any lands defendants might have lost through any withdrawals.

An additional reason for requested finding 4 above is that the Court cannot make the accounting or the determinations required by Section 5 of the Act of June 25, 1929, or charge against the defendants the excess lands or values as provided by Sec-
1040 tion 6, without first receiving evidence upon the fraud and breaches of contract on the part of the defendants, and the errors of administration in the grant, alleged in those portions of the amended complaint stricken by the order of the Court entered October 3, 1935. Thus, in particular, since the

facts alleged in Subdivision XXVIII of said complaint demonstrate that the defendants have received large amounts in lands, or values, through fraud and breach of contract, the Court cannot without finding of fact thereon make the determination required by Section 5 of the Act of June 25, 1929, as to what lands have been wrongfully or erroneously patented or certified as the result of fraud, mistake of law or fact, or through misapprehension, and cannot determine, as required by Section 6, what quantities in lands or values the defendants have received in excess of the full amounts they were entitled to receive.

For the same reasons the Court should make the said conclusion herein requested.

NORMAN M. LITTELL,
Assistant Attorney General.
WALTER L. POPE,
E. E. DANLY,
Special Assistants to the Attorney General.

1041 In United States District Court

Motion to adopt master's report as findings of fact and conclusions of law

Filed June 26, 1939

Defendants move the court to enter an order adopting the first report of the Special Master, filed herein May 31, 1933, as the court's findings of fact and conclusions of law under Equity Rule 70½ and Rules of Civil Procedure 52 and 53 (e) (2), and attach a memorandum in support thereof.

L. B. DAPONTE,
D. R. FROST,
Attorneys for Defendants.

Memorandum

The Master's first report was filed May 31, 1933. The order of October 3, 1935, as amended by the order of January 29, 1936, confirming the report, was, of course, not appealable. The order was later made appealable by the Act of May 22, 1936 (49 Stat. 1369). Therefore, neither Rule 70½, then in effect, nor Rules 52 and 53 (e) (2) were applicable. But by said Act of 1936 the order on the first report is made appealable. Therefore, Rule 70½, if considered applicable, must be complied with on this appeal. The rule provides that the court shall find the facts

specially and separately state its conclusions of law, which shall be entered of record, and, if an appeal be taken, shall be sent to the appellate court. Undoubtedly this rule must have been complied with had the order of October 3, 1935, as amended, been appealable.

Rule 52 of the new rules of civil procedure is practically the same as Equity Rule 70½. It provides that in cases tried without a jury the court shall find the facts separately and state separately its conclusions of law and direct the entry of the appropriate judgment. The rule also provides that: "The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court." Rule 53 (e) (2) provides that the court shall adopt the Master's findings of fact unless clearly erroneous. The parties may make written objections. The Court, after hearing, may adopt the report or modify or reject it in whole or in part or receive further evidence or recommit it with instructions.

The effect of Rules 52 and 53 (e) (2) is that there must be findings of fact and conclusions and the court, after hear-
1042 ing, shall adopt the Master's findings of fact or modify or reject the report, etc.

Evidence was taken for consideration by the Master, and in addition, the allegations of the bill, which were taken as true on the demurrers. The Master's report finds the facts separately from his conclusions of law and is in good and sufficient form for adoption as the court's own findings and conclusions and was so adopted. Defendants submit this memorandum in support of the foregoing motion.

L. B. DAPONTE.
D. R. FROST.

[File endorsement omitted.]

1043 *Minutes of court*

In United States District Court, Eastern District of Washington, Northern Division

Journal No. 14, Page 590

April 1939 term. Monday, June 26, 1939. 49th day

Court convened pursuant to adjournment at 10:00 A. M.

Present: Honorable J. Stanley Webster, Judge; A. A. LaFramboise, Clerk; R. R. Isaacs, Deputy U. S. Marshal, and T. V. Dean, Court Reporter.

PROCEEDINGS

No. E-4389-Hearing on Settlement of Findings, etc.

UNITED STATES OF AMERICA, PLAINTIFF

v.

NORTHERN PACIFIC RAILWAY COMPANY, ET AL., DEFENDANTS

Now on this 26th day of June 1939, this matter came on for hearing on settlement of Findings of Fact, etc. E. E. Danly and W. L. Pope, appearing for the Plaintiff. L. B. daPonte and D. R. Frost appearing for the Northern Pacific Railway Company and Mr. Hueston appearing for City Bank Farmers Trust Company and Bankers Trust Company.

Mr. L. L. Schwarm, recalled and testified on behalf of the defendants.

The following exhibits were received in evidence on behalf of the defendants.

Northern Pacific Exhibit "A"—Affidavit of Verner A. Gilles filed August 15, 1938.
Northern Pacific Exhibit "A-1"—Stipulation filed July 26, 1938.
" " " "B" —Stipulation and affidavit of Verner A. Gilles filed September 23, 1938.
" " " "B-1"—Stipulation filed June 26, 1939.
" " " "C" —List of land in Area A.
" " " "D" —List of land in Montana, patented as Place land.
" " " "E" —List of land first indemnity within Reservations.
" " " "F" —List of land second indemnity within Reservations.
" " " "G" —List of land mineral indemnity within Reservations.
" " " "H" —List of land first indemnity within Reservations, Wash.

Mr. Abe Barber recalled and testified on behalf of the plaintiff.

The following exhibits were received in evidence:

Government's Exhibit "A"—Second Indemnity limits in Montana.
" " "B"—Schedule of lands found to be mineral.
" " "C"—Schedule of lands withdrawn for phosphates, etc.
" " "D"—Schedule showing Montana prior nonmineral loses.
" " "E"—Schedule showing vacant lands in Montana, second indemnity.

1044 Government's Exhibit "F"—Schedule showing vacant lands in Idaho, second indemnity.

Plaintiff's request for Findings of Fact and Conclusions of Law on Crow losses, refused.

Plaintiff's motion for the Court to make Conclusions of Law on subdivision XIV of amended answer of Northern Pacific filed July 18, 1931, argued and denied.

Plaintiff's request for additional Findings of Fact and Conclusions of Law on right to compensation, argued and denied.

Defendants' Motion that the Report of the Special Master filed May 31, 1933, be adopted as the Court's Findings of Fact and Conclusions of Law, argued and denied.

Continued for signing of Findings and Decree until tomorrow, June 27th, at 2:00 P. M.

Thereupon Court adjourned until tomorrow at 1:30 P. M.

J. STANLEY WEBSTER,
District Judge.

1045 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Objections to proposed findings of fact and conclusions of law of the court

Filed June 27, 1939

This cause having come on for further hearing upon a review of the Second Report of the Special Master, preliminary to the making and filing of findings and conclusions by the Court, and the Court having examined a draft of proposed findings and conclusions presented by the defendants, and having announced that it was about to make such findings and conclusions, with certain

modifications, which findings and conclusions, so modified, and numbered and subdivided with the numbers and subdivisions hereinafter referred to, were examined by counsel for the respective parties, the plaintiff, for the purpose of making known to the Court the plaintiff's objections to the findings and conclusions about to be made by the Court, and for the purpose of stat-
1046 ing plaintiff's grounds for such objections, as provided by Rule 46 of the Federal Rules of Civil Procedure, says:

1. Plaintiff objects to the making of finding (b) in Subdivision I, "General Findings and Conclusions," because of the failure of the Court to add thereto, in order to disclose all of the facts with relation to the construction of the railroad, a statement and finding of fact that the time limited in the Act of July 2, 1864, as amended, for the completion of said railroad, was July 4, 1879; that on that date 530.4 miles of the contemplated road had been constructed; and that thereafter 1,507.31 miles of road were constructed; but the main line of the railroad between Wallula, Washington, and Portland, Oregon, via the Valley of the Columbia River, a distance of approximately 225 miles, was never definitely located or constructed.

The ground for this objection is that without the addition of the matters last stated, the finding is incomplete as to the construction of said railroad. The matters last stated which should have been added to said finding are admitted by all the pleadings, or are disclosed by official documents of which the Court takes judicial notice.

2. Plaintiff objects to findings (c), (d), (e), and (f) in Subdivision I, "General Findings and Conclusions," all relating to certain mortgages and foreclosure proceedings in connection therewith, and as grounds for such objection says:

(a) That the Court is without authority to make findings in respect thereto for the reason that the portions of the Amended Bill of Complaint which alleged certain facts with respect to said mortgages and the foreclosure thereof were stricken from the bill by the order of the Court of October 3, 1935, as amended by the order of January 29, 1936, and no issue with respect to such matters was tried upon the facts.

(b) That such findings ought not to be made for the reasons and because of the several matters set forth in the portions of the said amended Bill of Complaint so stricken.

1047 3. Plaintiff objects to the Court's conclusion (a) in said Subdivision I, "General Findings and Conclusions," which said conclusion relates to the said mortgages, for the same reasons and on the same grounds stated in the next preceding objection hereof.

4. Plaintiff objects to conclusion (a) in Subdivision II, "Validity or Invalidity of Withdrawals, 1864 Grant," for the reason that the same is contrary to law and for the same reasons stated by plaintiff in its exception No. XLI to the Second Report of the Master, which report was filed July 26, 1937, which exception is by reference incorporated herein.

5. Plaintiff objects to conclusion (b) in Subdivision II, "Validity or Invalidity of Withdrawals, 1864 Grant," for the reason that the same is contrary to the provisions of the Joint Resolution of May 31, 1870, and for all of the reasons stated by plaintiff in its exception No. LII to the Second Report of the Master, which exception is by reference incorporated herein.

6. Plaintiff objects to that part of conclusion (c) in Subdivision II, "Validity or Invalidity of Withdrawals, 1864 Grant," contained in the last sentence thereof, and concluding that the withdrawals there stated were and are invalid, and objects to all findings in the findings of fact within the said Subdivision II, in support of such conclusion, with respect to the availability of said lands for indemnity selection. The grounds for such objections are:

(a) That such findings or conclusions ought not to be made without a determination by the Court of the several matters set forth in those portions of the Amended Complaint stricken therefrom by the Court's order of October 3, 1935, as amended January 29, 1936. By this portion of this objection plaintiff is again urging each matter stated in its exceptions to the First Report of the Master.

(b) That such findings or conclusions ought not to be made for each of the several reasons set forth in exceptions XL to LIII, inclusive, made by plaintiff to the Second Report of the
1048 Master, which exceptions are by reference incorporated herein.

(c) That such findings or conclusions ought not to be made for the reason and on the ground that it appears from all of the pleadings herein and particularly in Subdivision No. XXV of the amended and supplemental answer of Northern Pacific Railway Company filed herein July 18, 1931, that no line of railroad was constructed by the Northern Pacific Railroad Company between Wallula, Washington, and Portland, Oregon, and that no such line of railroad was ever definitely located between said points, via the Valley of the Columbia River, a distance of approximately 225 miles, and that therefore at the time of the withdrawals in controversy in this suit, the United States had been and was and is excused from conveying, and was and is under no obligation to convey, any of the indemnity lands em-

braced within such withdrawals for governmental purposes, and that by reason thereof said withdrawals were and are valid and that none of the defendants are entitled to any compensation for any of said withdrawn lands, or to patent for any indemnity lands.

(d) That such findings or conclusions ought not to be made for the reason and on the ground that because of said failure to locate or construct said line no proof has been or can be made in this suit to support a finding of the invalidity of said withdrawals even if the failure to construct said line of road had not operated to terminate the right of the defendants to further indemnity lands. Had said line of road been located and constructed the additional indemnity areas resulting therefrom might have been sufficient to satisfy all losses at the time of all of said withdrawals and it is not competent for the defendants to claim, or for the Court to find, an invalidity of withdrawals based upon a limitation of the area of the indemnity belts caused by the defendants' own default.

(e) That such findings or conclusions ought not to be made insofar as they refer to or include the withdrawals of March 1, 1898, of 163,280 acres in the second indemnity belt in
1049 Idaho, for the reason that the Court should find as more particularly stated by plaintiff in its exception No. XLVII to the Second Report of the Master, that said withdrawals of March 1, 1898, were valid except as to 5,379.04 acres. Said exception is by reference incorporated herein.

(f) That such findings or conclusions ought not to be made, insofar as they refer to or include withdrawals in second indemnity limits in Montana, for the reasons and on the grounds hereinafter stated in objection numbered 8 (b).

7. Plaintiff objects to conclusion (d) in Subdivision II, "Validity or Invalidity of Withdrawals, 1864 Grant", wherein it is concluded that compensation may be had for certain withdrawn lands, upon the following grounds:

(a) That such conclusion ought not to be made without a determination by the Court of the several matters set forth in those portions of the Amended Complaint stricken therefrom by the Court's order of October 3, 1935, as amended January 29, 1936. By this portion of this objection plaintiff is again urging each matter stated in its exceptions to the First Report of the Master.

(b) That such conclusion ought not to be made for each of the several reasons set forth in exceptions XL to LII, inclusive, made by plaintiff to the Second Report of the Master.

(c) That such conclusion ought not to be made for the reason that there is no evidence before the Court that any of the lands

contemplated within the several withdrawals involved in the suit would have been obtained by the defendants or any of them if said withdrawals had not been made, or if Congress had not passed the Acts of June 5, 1924 (43 Stat. 461), and June 25, 1929 (46 Stat. 41); that there is no evidence before the Court that any of the withdrawals, or that the passage of the Act of June 5, 1924, or the Act of June 25, 1929, operated to lessen or diminish the amount of lands which the defendants would have received had such withdrawals not been made; that there is no evidence
1050 before the Court as to which of the withdrawn lands, if any, or what amount of lands, the defendants or any of them, would have obtained had such withdrawals not been made or the said Acts not been passed; that there is no evidence before the Court that the things and acts done and performed by the plaintiff in the administration of the grants, taken singly, or as a whole, resulted in the defendants' receiving a less amount of land than defendants were entitled to or would have received had there been no errors in the administration of such grants.

Since the withdrawn lands could only be selected when surveyed, and since these lands, if not withdrawn or if restored to the public domain instead of being retained by Congressional Act would also have been available for acquisition under the public land laws, it is a matter of pure speculation whether any, or if any what withdrawn lands would have been obtained by the defendants had such withdrawals not been made.

By the illegal withdrawals mentioned in subdivision XXXII of the Amended Complaint there occurred errors in the administration of the grants which resulted in the defendants receiving lands they would not otherwise have had, and the latter lands are not shown to be less in amount than any lands defendants might have lost through any withdrawals.

(d) That such conclusion ought not to be made for the reason that the Court cannot make the accounting or the determinations required by Section 5 of the Act of June 25, 1929, or charge against the defendants the excess lands or values as provided by Section 6, without first receiving evidence upon the fraud and breaches of contract on the part of the defendants, and the errors of administration in the grants, alleged in those portions of the Amended Complaint stricken by the order of the Court entered October 3, 1935, and amended January 29, 1936. Thus, in particular, since the facts alleged in subdivision XXVIII of said complaint demonstrate that the defendants have received
1051 large amounts in lands, or values, through fraud and breach of contract, the Court cannot without findings of fact thereon make the determination required by Section 5

of the Act of June 25, 1929, as to what lands have been wrongfully or erroneously patented or certified as the result of fraud, mistake of law or fact, or through misapprehension, and cannot determine, as required by Section 6, what quantities in lands or values the defendants have received in excess of the full amounts they were entitled to receive.

8. Plaintiff objects to conclusion (e) in Subdivision II, "Validity or Invalidity of Withdrawals, 1864 Grant".

(a) This objection is made upon all of the reasons and grounds stated by the plaintiff in its objection to said conclusion (d) last above referred to.

(b) Such conclusion ought not to be made, insofar as it refers to or includes second indemnity limits in Montana, for the reason and on the ground that the amount of lands in the second indemnity limits in any state which the company may be entitled to receive is limited to the amount of the losses in the primary limits in such state occurring between July 2, 1864, and the respective dates of definite location of the road in such state, which losses are denominated subsequent losses; and inasmuch as it appears from the evidence in this case, including that taken subsequent to the hearing on exceptions to the Master's Second Report, that the area of land in the second indemnity limits in Montana which has been heretofore patented to either the Northern Pacific Railroad Company or the Northern Pacific Railway Company under the provisions of the Grant of 1864 totals 1,400,934.83 acres, and that the total of the subsequent losses in Montana, other than losses within the area of the Crow Indian Reservation, as defined by the Treaty of May 7, 1868, do not exceed 282,121.73 acres, and since the area of the Crow Indian Reservation in Montana, as defined by the Treaty of May 7, 1868, was within the Crow Indian Area, as defined by the Treaty of September 17, 1851, the Crow reservation losses are
1052 prior losses and not subsequent losses, and inasmuch as the lands already received by said companies in the second-indemnity limits in Montana greatly exceed the amount of subsequent losses in such state, the defendants are not entitled to compensation for or on account of any additional lands in said limits.

9. Plaintiff objects to conclusion (a) in Subdivision II "Validity or Invalidity of Withdrawals, Grant of 1870," for the identical reasons and grounds stated in objection numbered 4 herein.

10. Plaintiff objects to conclusion (b) in Subdivision II "Validity or Invalidity of Withdrawals, Grant of 1870," that certain withdrawals are invalid, and to the findings in the findings of fact upon which the said conclusion is based, relating to the availability of the lands in such withdrawals for indemnity selec-

tion, for the reasons and on the grounds stated in objection numbered 6 (a), 6 (b), 6 (c) and 6 (d) herein.

11. Plaintiff objects to conclusion (c) in Subdivision II "Validity or Invalidity of Withdrawals, Grant of 1870," that defendants are entitled to compensation for such withdrawn lands, for the reasons and on the grounds hereinbefore stated in plaintiff's objection numbered 7 herein.

12. Plaintiff objects to any findings or conclusions:

(a) finding or concluding that the withdrawals involved in the suit, or any of them, are invalid;

(b) finding or concluding that the defendants, or any of them, are entitled to any compensation for or on account of any of the lands within such withdrawals;

(c) finding or concluding that the defendants, or any of them, are entitled to receive patent to any further indemnity lands.

The grounds for these objections are:

(a) That such findings or conclusions ought not to be made without a determination by the Court of the several matters set forth in those portions of the Amended Complaint stricken therefrom by the Court's order of October 3, 1935, as amended,
1053 January 29, 1936. By this portion of this objection plaintiff is again urging each matter stated in its exceptions to the First Report of the Master.

(b) That such findings or conclusions ought not to be made for each of the several reasons set forth in those exceptions made by plaintiff to the Second Report of the Master which the Court has heretofore overruled. By this portion of this objection plaintiff is renewing the objections which it made to the Master's Second Report.

(c) That such findings or conclusions ought not to be made for the reasons specified in plaintiff's request for additional findings and conclusions (on right to compensation) filed June 26, 1939.

(d) That such findings or conclusions ought not to be made for the reasons specified in plaintiff's motion and notice of motion to make and adopt conclusions of law relating to the failure to construct the road, filed June 26, 1939.

13. Plaintiff objects to conclusion (a) in Subdivision III "Tacoma Overlap" for the reason and on the ground that said conclusion is erroneous in that the Joint Resolution which authorized a second indemnity belt of ten miles "beyond the limits prescribed in (the) charter," does not authorize such belt opposite the new line from Portland to Puget Sound, the construction of which road was authorized by the said Joint Resolution and not by the Charter Act of June 2, 1864, and said conclusion is contrary to law.

14. Plaintiff objects to the conclusion in Subdivision IV "Portage Conflict," in holding that the base assigned by defendant to support selections made with said 347,141.24 acres is valid base. Since the greater portion of the mineral base assigned arose by reason of the classification made under the Act of February 26, 1895, the Court ought not to approve the same without passing upon the facts alleged in those subdivisions of the Amended Complaint in which fraud and breach of contract are alleged. Furthermore, all of said base is invalid and improper because
1054 the defendants have no valid indemnity or selection rights or base, for the reasons heretofore stated in these objections.

15. Plaintiff objects to the findings and conclusions in Subdivision V, "Montana Place Limits Error," in finding and holding that the base assigned in N. P. Exhibit D is proper unused base. The reason for this objection is the same as the reason stated in the preceding objection, number 14.

16. Plaintiff objects to the approval and adoption by the Court, in Subdivision VIII, "Agricultural Lands," of the Master's findings of fact and conclusions of law contained under the heading, "Lands Selectable for Mineral Losses: Meaning of Agricultural Lands," and his formal findings and conclusions under the heading, "V. Agricultural Lands," and objects to each of the findings of fact and conclusions of law so adopted, for the reasons and on the grounds stated in plaintiff's exceptions numbered VII to XI taken to the Second Report of the Master, and which exceptions are by reference made a part hereof.

17. Plaintiff objects to the Court's approval and adoption in Subdivision XI, "Northern Cheyenne Indian Reservation Lands," of the Master's findings of fact and conclusions of law contained under the heading "Lands in Northern Cheyenne Indian Reservation, 52,052.93 acres," and his formal findings and conclusions under the heading "VIII. Northern Cheyenne Indian Reservation," and objects to the findings of fact and conclusions of law so adopted, for the reasons and on the grounds stated in plaintiff's exceptions numbered XIII to XV, inclusive, taken to the Second Report of the Master, and which exceptions are by reference made a part hereof.

18. Plaintiff objects to the Court's findings and conclusions in Subdivision XII, "Lands Patented to Homesteaders after Withdrawal," wherein the Court proposes to conclude that the Railway Company is entitled to compensation for the lands therein mentioned, and to find that said lands were available to the
1055 Railway Company, because the Railway Company is not entitled to any compensation for any lands, for the rea-

sons hereinbefore stated in these objections, and also for the reasons stated in plaintiff's exception numbered LIV taken to the Second Report of the Master, and which exception is by reference made a part hereof.

19. Plaintiff objects to the conclusion in Subdivision XIV, "Eighty Acres of Vacant Lands in Grant of 1870," that such tract should be patented to the Company, because the defendants are not entitled to any further indemnity lands for the reasons heretofore stated in these objections.

20. Plaintiff objects to finding (b) in Subdivision XVII, "Lands for which the Defendant, Northern Pacific Railway Company, is entitled to Compensation from the United States," that the losses assigned are proper losses, and for grounds thereof says:

(a) That the mineral loss assigned should not be approved for the reasons hereinbefore stated in objection number 14.

(b) That a large part of the lands to which mineral base is assigned are not agricultural lands, as contemplated by the Act of July 2, 1864.

(c) That all of the losses assigned are invalid because the defendants have no valid indemnity or selection rights or base, for the reasons heretofore stated in these objections.

21. Plaintiff objects to that part of the conclusion in Subdivision XVII, "Lands for which the Defendant, Northern Pacific Railway Company, is entitled to Compensation from the United States," that the defendant, Northern Pacific Railway Company, is entitled to compensation for lands therein referred to. This objection is made upon the same grounds stated in objections numbered 7, 11, and 12 hereof.

22. Plaintiff objects to conclusion (a) in Subdivision XVIII, "Lands Listed or Selected but not Patented," in holding that the defendant, Northern Pacific Railway Company, is entitled
1056 to patent for certain indemnity lands, and to the findings upon which said conclusion is based, because the defendants have no valid indemnity or selection rights or base, for the reasons heretofore stated in these objections.

23. Plaintiff objects to the Court's finding (f) in Subdivision III, "Tacoma Overlap," for the reason and on the ground that the same is not within the issues in this case, it is not based on any evidence, and the same is contrary to law.

Dated June 27, 1939.

NORMAN M. LITTELL,
Assistant Attorney General.
WALTER L. POPE,
E. E. DANLY,
Special Assistants to the Attorney General.

1057 *Order*

The Court having duly considered each and all of the foregoing objections of plaintiff to the findings of fact and conclusions of law;

Now, therefore, prior to the making of the findings of fact and conclusions of law, and prior to the entry of the decree herein, it is hereby ordered and adjudged that each and all of said objections be, and the same are hereby, overruled. From said ruling the plaintiff is allowed an exception.

Done in Open Court this 27th day of June 1939.

J. STANLEY WEBSTER,
District Judge.

1058 In United States District Court

Defendants' objections to findings and decree

Filed June 27, 1939

I

Defendants and each of them object and except to the court's conclusion (b), p. 33 of its findings and conclusions, that the Railway Company is not entitled to indemnity under the Joint Resolution of 1870 for 637,580.99 acres of odd sections in the so-called Tacoma Overlap and that the grant of 1870 in Washington was not deficient at date of final location of the line thereby authorized and that, therefore, second indemnity limits were not properly laid down in Washington and that the withdrawal of 213,001.66 acres of land in second-indemnity limits in said State, except 16,240 acres, were valid; and ask the court to find that defendants are entitled to indemnity for said loss and that there was a deficiency in said State at said date of last definite location and that said second indemnity limits were properly laid down and said withdrawal was invalid and that defendants are entitled to receive compensation for said 213,001.66 acres.

II

Defendants further object and except to conclusion (c), p. 33 of the court's findings and conclusions, that title of the United States to said 213,001.66 acres, except 16,240 acres, be quieted.

III

Defendants object and except to that portion of paragraph IX of the decree that withdrawn lands in second-indemnity limits

of the grant of 1870, State of Washington, described in Schedule K attached to said decree, be retained by the United States without payment of compensation to defendants and that the claims of defendants to any interest in said lands be canceled and that the title of the United States be quieted; defendants ask that said decree adjudicate the invalidity of the withdrawal of said lands described in Schedule K and award them compensation therefor.

L. B. DAPONTE,
D. R. FROST,
Attorneys for Defendants.

The foregoing objections were presented at the time of and prior to the entry of findings and decree herein and are hereby overruled.

J. STANLEY WEBSTER,
District Judge.

Dated June 27, 1939.

[File endorsement omitted.]

1059 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Findings of fact and conclusions of law

Filed June 27, 1939

1060 This cause having been further argued to the court on exceptions to the Special Master's second report, filed July 26, 1937; the order of the court on said exceptions having been entered; and the parties having, by stipulation dated March 23, 1939, settled certain remaining issues relating to the adjustment of the grants, not determined by said order on exceptions; and the court having heard further evidence relating to matters covered by said stipulation of March 23, 1939, and required to comply with this court's ruling on said exceptions to the Master's said second report; and all matters required to be heard and determined by the court upon a review of the Special Master's said second report having been disposed of; the court, being fully advised, now makes the following findings and conclusions in compliance with court rules and the Act of Congress of June 25, 1929, to-wit:

1061

I

General Findings and Conclusions

FINDINGS

(a) The Northern Pacific Railroad Company was created by the Act of Congress of July 2, 1864, with authority to construct a railroad and telegraph line from a point on Lake Superior to Puget Sound, and by the Joint Resolution of May 31, 1870, was authorized to construct a railroad from a point at or near Portland to Puget Sound.

(b) The last definite location of said railroad from Lake Superior to Puget Sound was December 8, 1884, and for the road from Portland to Puget Sound the last definite location was September 22, 1882. Said lines of railroad were constructed in compliance with the Act of July 2, 1864, and Joint Resolution of May 31, 1870, substantially on the line of definite location. The said railroads were examined by the Commissioners, favorably reported, and were accepted by the President of the United States as in all respects in compliance with said Act and Joint Resolution. The last construction of said railroad was in 1887.

(c) Northern Pacific Railroad Company executed and delivered certain mortgages, described as follows:

1062 Mortgage dated July 1, 1870 by Northern Pacific Railroad Company to Jay Cooke and John Edgar Thompson covering all the property of said Railroad Company, including the land grant and rights to receive additional lands;

First Mortgage Missouri Division to Farmers' Loan & Trust Company, Trustee, dated May 1, 1879, covering the line of railroad from the Missouri River in North Dakota to the Yellowstone River in Montana and the land grant pertaining thereto;

First Mortgage Pend d'Oreille Division by Northern Pacific Railroad Company to Farmers' Loan & Trust Company, Trustee, dated September 1, 1879, covering the line of railroad from Snake River in Washington to Lake Pend d'Oreille in Idaho and the land grant pertaining thereto;

General First Mortgage by Northern Pacific Railroad Company to Central Trust Company, Trustee, dated January 1, 1881, covering the line of railroad from Lake Superior to Puget Sound and from Portland to Tacoma and all lands granted by Congress;

General Second Mortgage by Northern Pacific Railroad Company to Farmers' Loan & Trust Company, Trustee, dated November 20, 1883, covering the same property as the General First Mortgage (except certain lands) and all lands granted by Con-

gress except lands in Minnesota and North Dakota east of the Missouri River;

General Third Mortgage by Northern Pacific Railroad Company to Farmers' Loan & Trust Company, Trustee, dated December 1, 1887, covering the same property as the General Second Mortgage;

Consolidated Mortgage by Northern Pacific Railroad Company to Farmers' Loan & Trust Company, dated December 2, 1889, covering (with other property, branch lines and securities) the same property as the General Second and General Third Mortgages.

(d) In a certain consolidated cause entitled, Farmers' Loan & Trust Company et al. v. Northern Pacific Railroad Company, in the Circuit Court of the United States for the Eastern District of Wisconsin, decrees dated April 27 and April 28, 1896, foreclosing said General Second Mortgage, General Third Mortgage and Consolidated Mortgage, were duly entered; and subsequently decrees ancillary to said decrees of April 27 and April 28, 1896 were duly entered in the Circuit Court of the United States in similar causes between the same parties, as follows:

1063 District of Minnesota, April 29, 1896.
District of Montana, May 1, 1896.
District of North Dakota, May 2, 1896.
District of Washington, May 2, 1896.
Western District of Wisconsin, May 1 and May 4, 1896.
District of Idaho, May 4, 1896.
District of Oregon, May 4, 1896.
Northern District of Illinois, May 12, 1896.
Southern District of New York, May 12, 1896.

Pursuant to said decrees and ancillary decrees said railroad and land grant and rights to additional lands were duly sold to Northern Pacific Railway Company and said sales were confirmed by decrees duly entered in the Circuit Court of the United States as follows:

Eastern District of Wisconsin, July 27 and August 8, 1896.
Western District of Wisconsin, July 27 and August 17, 1896.
District of Idaho, August 3, 1896.
Northern District of Illinois, July 28, 1896.
District of Minnesota, July 27, 1896.
District of Montana, July 28 and August 1, 1896.
Southern District of New York, July 30, 1896.
District of North Dakota, July 29, 1896.
District of Oregon, August 4, 1896.
District of Washington, August 3, 1896.

Said sales were public sales, at places within the States and Territories in which the lands were situated, after not less than

sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder, in accordance with the requirements of the Joint Resolution of May 31, 1870.

1064 (e) On April 27, 1899, a further decree in said cause was entered, and amended May 25, 1899, directing the sale of all remaining lands and assets of said Northern Pacific Railroad Company, including rights to lands in Minnesota and North Dakota east of the Missouri River, and pursuant thereto said lands and rights to additional lands were sold at public sale at places within the States and Territories in which the lands were situated, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder, in accordance with the requirements of the Joint Resolution of May 31, 1870, and by decree entered in said cause dated September 16, 1899, said sales were confirmed.

(f) Thereafter, for further assurance of title, sundry deeds of conveyance were, pursuant to said decrees, made, executed, and delivered by Northern Pacific Railroad Company to Northern Pacific Railway Company, from Alfred L. Carey, Special Master, to Northern Pacific Railway Company, from the receivers of said Northern Pacific Railroad Company to Northern Pacific Railway Company, and from the trustees under said mortgages to Northern Pacific Railway Company, conveying said railroad, land grant, rights to receive additional lands and all other property and rights pertaining to said Northern Pacific Railroad Company by virtue of said Act of July 2, 1864, and Joint Resolution of May 31, 1870.

(g) It was stipulated by the parties that the court should take judicial notice of the decisions of the United States Land Department in land grant cases, as published in the reports and shown by the records of the General Land Office.

1065 CONCLUSIONS

(a) Said mortgages above described were duly executed under authority conferred by said Joint Resolution of May 31, 1870, and were valid. The foreclosure of said General Second, General Third, and Consolidated Mortgages, above described, and the sale of said railroad and lands and rights to receive additional lands, and the decrees, dated August 8, 1896, and September 16, 1899, entered in said consolidated cause, and all said ancillary decrees, were valid, and said sundry deeds of conveyance were valid.

(b) Under and by virtue of said foreclosures and sales and said sundry deeds Northern Pacific Railway Company acquired

and owns said railroad, said granted lands, and rights to receive other lands, including the right to receive unpatented lands and just compensation for withdrawn lands, and all other rights as provided by the Act of June 25, 1929, and all and singular the rights, grants, and privileges conferred on said Northern Pacific Railroad Company by said Act of July 2, 1864, and Joint Resolution of May 31, 1870, and became and is the successor in interest of said Northern Pacific Railroad Company in and to all of said property and rights.

1066 II

VALIDITY OR INVALIDITY OF WITHDRAWALS—1864 GRANT

FINDINGS

(a) The aggregate of the odd-numbered sections within place limits of the grant of July 2, 1864, and the gross area thereof (after deducting for an error of 5,785.58 acres in laying down place limits in Montana), is 40,960,150.58 acres. The only deduction therefrom is 347,141.24 acres for the conflict with the prior grant to the Portage, Winnebago & Superior Railway Company. The measure of the grant is 40,613,009.34 acres. The United States, prior to passage of the Joint Resolution of June 5, 1924, duly conveyed to Northern Pacific Railroad Company and Northern Pacific Railway Company 36,350,279.74 acres; Northern Pacific Railway Company as successor in interest to said Northern Pacific Railroad Company had received scrip for 1,029,874.16 acres relinquished under relief and exchange acts: Northern Pacific Railroad Company and Northern Pacific Railway Company received 503,751.43 acres by court decrees in various cases; Northern Pacific Railway Company is entitled to receive patents for 417,111.61 acres under said Act of July 2, 1864.

(b) The unsatisfied losses within the place limits of the grant of July 2, 1864, on March 1, 1898, were 5,946,664.99 acres.

(c) The total area of vacant, surveyed, nonmineral land (i. e., excluding vacant, unsurveyed lands and vacant lands subsequently classified as mineral) available for selection by the Railway Company for said losses within the first, second, and mineral
1067 indemnity limits of the grant of July 2, 1864, on March 1, 1898, immediately prior to the withdrawals of that date, was 1,015,932.95 acres. At that time there were within place limits of the grant 127,723.05 acres of vacant, surveyed, nonmineral lands, of which 6,147.47 acres were later placed in the Absaroka forest.

(d) The Railway Company had on March 1, 1898, more than sufficient proper losses for the selection and taking of said entire area of 1,137,508.53 acres of vacant, surveyed, nonmineral lands.

(e–1) On March 1, 1898, and immediately prior to the withdrawals of that date, there was a deficiency in all indemnity limits of the grant of 1864 as stated in paragraphs (b), (c), and (d). A deficiency continued to exist at all times between March 1, 1898, and June 5, 1924, except that in second indemnity limits of Idaho on March 21, 1905 (the date of withdrawal hereinafter referred to), there were more surveyed nonmineral lands than required to satisfy all losses satisfiable in said Idaho second indemnity limits that said Railway Company then had.

(e–2) The Secretary of the Interior would not accept selections by the Railway Company of indemnity lands prior to survey and plat thereof being filed in the local lands office. Said rule was in effect on March 1, 1898, and at all times subsequent thereto. Neither would the Secretary permit indemnity selections after withdrawal for forest or other governmental purposes prior to decision of the Forest Reserve Case, 256 U. S. 51, decided April 11, 1921. The Railway Company repeatedly attempted to select said lands but its selections were rejected by the local land
1068 officers, the Commissioner of the General Land Office, and Secretary of the Interior, pursuant to said rule. It was at all times the position of the Secretary of the Interior that said withdrawals abrogated all rights of selection the railroad company may have had.

1069 WITHDRAWALS IN FIRST INDEMNITY LIMITS

(f) By various proclamations of the President and executive orders made between March 1, 1898, and May 15, 1924, there were withdrawn and placed in national forests or other government reservations 1,087,184.19 acres in first indemnity limits in Minnesota, Montana, Wyoming, Idaho, Washington, and Oregon, and 180.25 acres in mineral indemnity limits in Wisconsin and Minnesota. These withdrawn lands were on June 5, 1924, within the exterior limits of said national forests or other government reservations, and on the dates of the respective withdrawals thereof for said governmental purposes would be, or were, if they had not been withdrawn and if surveyed, available to the Railway Company, by indemnity selection, to satisfy the deficiency in said grant of July 2, 1864, existing on the date of each such withdrawal. If not so withdrawn, such lands would also have been available for acquisition under the public land laws. The following statement shows the exhibit number, date

of withdrawal, purpose of withdrawal, number of acres and reference to proclamation or executive order under which said withdrawals in first indemnity limits in all states and mineral indemnity limits in Wisconsin and Minnesota were made:

1070 FIRST INDEMNITY LIMITS

MINNESOTA

Ptf. Ex.	Date	Purpose	Order	Acres
142	May 14, 1915	Bird Reserve	Ex. Order 2199	6.27
143	Oct. 13, 1920	" "	" 3340	0.33

MONTANA

144	March 1, 1898	Forest	Proclamation 29 Stat. 899, 907, 911, Ex. Order 396, 398.	294,395.36
145	July 14, 1899	"	Letter Asst. Commr. G. L. O.	3,902.60
146	March 19, 1900	Indian Res'n	Ex. Order	17,942.32
147	Dec. 18, 1901	Forest	Letter Commr. G. L. O.	37,511.80
148	Sept. 4, 1902	"	Proc. 32 Stat. 2027	4,132.20
149	Oct. 31, 1903	"	Telegram Acting Commr. G. L. O.	8,609.53
150	Jan. 20, 1904	"	Letter Act. Commrs. G. L. O.	43,533.72
151	Feb. 12, 1904	"	Letter Commrs. G. L. O.	5,471.51
152	May 12, 1904	"	"	73,550.31
152-A	July 14, 1899	"	Letter Asst. Commr. G. L. O.	320.76
153	Oct. 3, 1905	"	Proc. 34 Stat. 3168	6,949.45
154	Jan. 11, 1906	"	Letter Secy. of Int.	2,254.32
155	March 7, 1906	"	Proc. 34 Stat. 3193	320.00
156	April 12, 1906	"	Proc. 34 Stat. 3196	12,880.24
157	June 2, 1906	"	Proc. 34 Stat. 3212	10,476.19
158	Sept. 17, 1906	"	Letter Act. Secy. Int	3,394.00
159	Sept. 18, 1906	"	" " " "	9,601.00
160	Oct. 9, 1906	"	" " " "	320.00
161	Nov. 5, 1906	"	Proc. 34 Stat. 3254	7,968.24
161-A	Nov. 6, 1906	"	Proclamation	4,682.71
162	March 2, 1907	"	Proc. 34 Stat. 3304 & 3305	30,355.66
163	June 22, 1909	Power	Letter Act. Director Geological Survey.	40.92
164	April 16, 1917	Game	Ex. Order 2599	778.04
165	March 18, 1918	Stock	Order Secy. of Int	209.56

WYOMING

166	May 22, 1902	Forest	Proc. 32 Stat. 1999	33,660.00
167	Jan. 29, 1903	"	Proc. 32 Stat. 2030	13,607.96
168	April 21, 1903	Reclamation	Letter Secy. of Int	1,083.79
169	June 8, 1904	"	" " " "	2,006.04
170	Dec. 6, 1915	Petroleum	Executive Order	360.00

IDAHO

171	March 1, 1898	Forest	Proc. 29 Stat. 899, 903, Ex. Order 397, 398.	114,276.55
172	Dec. 18, 1901	"	Letter Commr. G. L. O.	515.00
173	March 21, 1905	"	" " " "	141,942.72
174	Jan. 18, 1906	"	Secy. of Interior	784.08
175	Dec. 11, 1906	"	" " "	2,777.77
176	April 21, 1910	"	" " "	160.00

1071

WASHINGTON

Pif. Ex.	Date	Purpose	Order	Acres
178	March 1, 1898	Forest	Proc. 29 Stat. 896, 903, 904	72,543.80
220	March 1, 1898	"	Proc. 29 Stat. 893, 896, 901	16,240.00
179	Dec. 18, 1902	"	Interior Department	85,193.35
181	July 26, 1906	"	" "	20,530.07
182	Aug. 25, 1906	"	" "	5,909.68
183	March 2, 1907	"	Proc. 34 Stat. 3297	1,172.52
184	Sept. 17, 1909	Power	Executive Order	883.79
184-A	Feb. 1, 1921	"	" "	133.29
184-AA	May 15, 1924	"	" "	92.74
		OREGON		
184-B	Aug. 22, 1904	Reclamation		40.00
	Total Withdrawals—First Indemnity Limits			1,103,424.19

MINERAL INDEMNITY LIMITS

WISCONSIN

110-A	Dec. 2, 1920	F. P. Project		40.00
		MINNESOTA		
111-A	Oct. 24, 1901	Flowage		57.26
111-B	March 22, 1905	"		83.00
	Total Withdrawals—Mineral Indemnity Limits			180.26

1072 (g) Of the withdrawals shown on Plaintiff's Exhibits 168 and 169 in Wyoming, 2,091.73 acres were included in a petroleum withdrawal made the 6th day of December 1915, and the 360 acres shown on Plaintiff's Exhibit 170 are withdrawn for petroleum. The only right defendant Railway Company has or claims in said lands is to receive compensation for the surface value only to the exclusion of compensation for the value of minerals, if any, therein, as provided by the Act of July 17, 1914 (38 Stat. 509).

There are approximately 18,181.06 acres in first and second indemnity limits of the grant of 1864 in the State of Montana, withdrawn and placed in national forests and also in other withdrawals mentioned in said Act of July 17, 1914, and with respect to all such lands the only right the Railway Company has or claims therein is to receive compensation for the value of the surface, irrespective of any value the same or any of them have for purposes specified in the withdrawals under said Act of July 17, 1914. Said 18,181.06 acres are described in tabulation marked Plaintiff's Exhibit C.

1073 WITHDRAWALS IN SECOND INDEMNITY LIMITS

(h) The second indemnity belt for the grant of 1864 was properly laid down pursuant to the Joint Resolution of May 31, 1870, by the Secretary of the Interior in Wisconsin on July 6, 1882, in Minnesota on November 20, 1871, in Montana on September 10, 1903, and in Idaho on March 1, 1906, and diagrams thereof were filed in the proper local land office. The interior lines of said second indemnity belt were 30 miles and the exterior lines, 40 miles from the line of definite location of said railroad in the states of Wisconsin and Minnesota, and the interior lines were 50 miles and the exterior lines 60 miles from said line of definite location in Montana and Idaho. Said second indemnity limits were parallel to and coterminous with the exterior lines of first indemnity limits.

(i) A deficiency in all indemnity limits as stated in paragraph (e-1) continued to exist at all times between March 1, 1898, and June 5, 1924, with the exception that in second indemnity limits of Idaho on March 21, 1905, the date of withdrawal hereafter referred to, there were more surveyed, nonmineral lands then required to satisfy all losses satisfiable in said Idaho second indemnity limits that said Railway Company then had.

1074 (j) By various proclamations of the President and executive orders made between February 3, 1892, and July 1, 1921, there were withdrawn and placed in national forests or other government reservations 961,992.84 acres in second indemnity limits. These withdrawn lands were on June 5, 1924, within the exterior limits of national forests or other government reservations, and on the dates of the respective withdrawals for said governmental purposes would be, or were, if they had not been withdrawn and if surveyed, available to the Railway Company, by indemnity selection, to satisfy any unsatisfied losses which were satisfiable in such belts, with the exception of the withdrawal dated February 3, 1892, in Montana and March 21, 1905, in Idaho. If not so withdrawn such lands would also have been available for acquisition under the public land laws. The following shows the exhibit number, date of withdrawal, purpose of withdrawal, number of acres, and reference to proclamation or executive order under which said withdrawals were made:

1075 SECOND INDEMNITY LIMITS

WISCONSIN

Ptf. Ex.	Date	Purpose	Order	Acres
110	March 15, 1921	Power Project	Letter Federal Power Commission.	40.00

MINNESOTA

111	Jan. 13, 1906	War Dept	Ex. Order 394-A	0.63

MONTANA

112	Feb. 3, 1892	Forest	Letter Commr. G. L. O	5,120.60
113	March 1, 1898	"	Proclamation 29 Stat. 899, 907, 911, Ex. Order 396.	279,539.53
114	July 14, 1899	"	Letter Asst. Commr. GLO	4,004.38
115	March 19, 1900	Indian	Executive Order	24,068.61
116	Dec. 18, 1901	Forest	Letter Commr. GLO	27,526.00
117	Aug. 16, 1902	"	Proc. 30 Stat. 2022, 2024	102,517.79
118	Aug. 24, 1903	Reclamation	Letter Secy. of Int	452.90
119	Oct. 31, 1903	Forest	Telegram Acting Commr. GLO.	917.80
120	Jan. 29, 1904	"	Letter Act. Commr. GLO	10,520.00
121	May 12, 1904	"	Letter Commr. GLO	41,183.35
122	Sept. 20, 1904	"	Letter Act. Secy. Int	3,109.50
123	Oct. 3, 1905	"	Proc. 34 Stat. 3168	42,252.01
124	Jan. 11, 1906	"	Letter Secy. of Int	1,038.79
125	April 12, 1906	"	Proc. 34 Stat. 3196	1,473.43
127	Sept. 17, 1906	"	Letter Act. Secy. Int	498.05
128	Sept. 18, 1906	"	" " " "	11,163.14
129	Oct. 9, 1906	"	" " " "	2,225.58
130	Nov. 5, 1906	"	Proc. 34 Stat. 3254	75,785.79
131	Nov. 6, 1906	"	Proc. 34 Stat. 3254	4,028.94
132	March 2, 1907	"	Proc. 34 Stat. 3304, 3305	80,553.89
133	April 19, 1912	Power	Executive Order	1,117.02
134	March 18, 1918	Stock	Order Secy. of Int	2,305.64
135	July 1, 1921	Power	Letter Exec. Secy. Fed. Power Comm.	90.85

IDAHO

136	March 1, 1898	Forest	29 Stat. 899, 903, Ex. Order 396	163,760.00
137	March 21, 1905	"	Letter Commr. GLO	83,623.36
138	Nov. 6, 1905	"	Proc. 34 Stat. 3236	520.16
139	Dec. 11, 1906	"	Secretary of Interior	3,484.00
140	March 2, 1907	"	Proc. 35 Stat. 2293	160.00
141	May 25, 1915	Irrigation	Executive Order	40.00
	Total Withdrawals—Second Indemnity Limits			961,992.84

1076 (k) The areas selected out of said 961,992.84 acres and the losses thereto assigned are shown by N. P. Exhibit G which is adopted as a part of this finding.

(l) All the lands embraced in the withdrawals herein found to be invalid are non-mineral lands except that certain of said lands are embraced within withdrawals for classification as, or are classified as phosphate, nitrate, potash, oil, gas or asphaltic minerals, or are reported as valuable for such minerals. The lands within such withdrawals which are so classified, or are

found to be valuable for such minerals are described in Government Exhibit No. C. The lands described in N. P. Exhibits 144, 145, and 146, for selection of which mineral losses are assigned (other than the 314,544.06 acres of Absaroka and Beartooth forest lands hereafter mentioned), are non-coal, non-iron agricultural lands.

(m) On March 1, 1898, prior to the withdrawals of that date for governmental purposes the vacant, surveyed, non-mineral lands within the indemnity limits of the grant of July 2, 1864, were insufficient to supply the unsatisfied losses in place. That condition obtained until after all withdrawals for governmental purposes had been made except that in second indemnity limits of Idaho on March 21, 1905, there were more surveyed, non-mineral lands than required to satisfy all losses satisfiable in second indemnity limits that said Railway Company then had. During all of said period patented lands within the place limits and all indemnity limits, plus all other lands within place limits not patented but which passed under the grant, and also all odd-numbered sections in all indemnity limits which the de-
1077 fendant was entitled to select under the regulations of the Secretary of the Interior and the United States Land Department, did not equal the area of all the odd-numbered sections granted by said Act of July 2, 1864. This state of facts existed on June 5, 1924, and June 25, 1929, and still exists.

CONCLUSIONS

(a) In determining the validity of said withdrawals in indemnity limits neither land unsurveyed at date of withdrawal nor lands thereafter classified as mineral can be counted.

(b) Defendants are entitled to use prior non-mineral losses as well as subsequent losses as base for selecting lands in second indemnity limits in the same state in which such losses occurred provided that the total acreage selected in said second indemnity limits of any state does not exceed the total amount of subsequent losses in said state.

(c) The withdrawal of 83,653.38 acres in second indemnity limits of Idaho on March 21, 1905, and the withdrawal on February 3, 1892, of 5,120 acres in second indemnity limits in Montana were and are valid. All other withdrawals in first and second indemnity limits in all states and mineral indemnity limits in Wisconsin and Minnesota were and are invalid, and the proclamations and withdrawal orders, so far as they purport to authorize said withdrawals, were and are invalid.

1078 (d) Defendants are entitled to just compensation provided for by the Act of Congress of June 25, 1929, for said 1,103,424.19 acres of withdrawn and expropriated lands in first indemnity limits, for 180.25 acres in Minnesota and Wisconsin mineral indemnity limits, and 170,326.73 acres in Montana and 23,385.96 acres in Idaho second indemnity limits, and 40 acres in Wisconsin second indemnity limits, and 0.63 acres in Minnesota second indemnity limits, except that defendants are entitled to just compensation for the value of the surface only of said lands withdrawn for petroleum and phosphate reserve in Montana and Wyoming, referred to in paragraph (g), p. 14, hereof.

(e) Defendants are entitled to select from said invalid withdrawals of 873,219.46 acres of second indemnity lands 193,753.32 acres for which they will receive just compensation as provided by said Act of June 25, 1929.

(f) Title of the United States to all of said withdrawn lands should be quieted and freed from all claims of defendants and each of them, arising out of the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, and acts supplementing or amending the same.

1079 VALIDITY OR INVALIDITY OF WITHDRAWALS—GRANT OF 1870

FINDINGS

(a) The aggregate of the odd-numbered sections within place limits of the grant by the Joint Resolution of May 31, 1870, in Washington and Oregon and the gross area thereof is 2,827,438.70 acres. Deducting 637,580.99 acres (the area of Tacoma Overlap), the area in place limits of said grant is 2,189,857.71 acres. The aggregate of the odd-numbered sections within place limits of the grant of 1870 in Washington and the gross area thereof is 2,399,493.25 acres. If said Tacoma Overlap acreage be deducted, the area of the grant in Washington is 1,761,912.26 acres. The Tacoma Overlap area is the only deduction in the grant by the Joint Resolution of May 31, 1870. The United States had, prior to passage of the Joint Resolution of June 5, 1924, duly conveyed to said Northern Pacific Railroad Company and Northern Pacific Railway Company 1,540,505.69 acres; Northern Pacific Railway Company as successor in interest to said Northern Pacific Railroad Company had received scrip for 48,796.95 acres of lands relinquished under relief and exchange acts; Northern Pacific Railroad Company received 161.11 acres by court decrees in various cases; Northern Pacific Railway Company is entitled to pat-

ent for 11,875.07 acres under said Joint Resolution of May 31, 1870.

(b) The unsatisfied losses within the place limits of the entire grant on March 1, 1898, not counting the Overlap area as a loss, were 626,073.61 acres, and counting said area as a loss, were 1,263,654.60 acres.

1080 (c) In the entire grant of 1870 the area of vacant, surveyed, nonmineral land available for selection by the Railway Company for said losses on March 1, 1898, including 7,448.33 acres of vacant, surveyed, nonmineral land within second indemnity limits of Washington, as established on November 10, 1906, and including 22,040.27 acres of vacant, surveyed, nonmineral lands in second indemnity limits of Oregon, as established on November 10, 1906, was 61,906.07 acres, and excluding said 7,448.33 acres of Washington second indemnity land and said 22,040.07 acres of Oregon second indemnity land, was 32,417.67 acres.

(d) The Railway Company had on March 1, 1898, more than sufficient proper losses with which to select and take the entire area of 61,906.07 acres, assuming that said lands were all available as indemnity for the losses mentioned in paragraph (b), whether or not the Overlap area be counted as a loss.

(e) On March 1, 1898, and immediately prior to the withdrawals of that date there was a deficiency in all indemnity limits as stated in paragraphs (b), (c), and (d), and a deficiency continued to exist at all times between March 1, 1898, and June 5, 1924, the period during which all of the withdrawals occurred.

1081 (f) By various proclamations of the President and executive orders made between March 1, 1898, and December 15, 1913, there were withdrawn and placed in national forests or other government reservations 155,727.84 acres in first indemnity limits in Washington. These withdrawn lands were on June 5, 1924, within the exterior limits of said national forests or other government reservations and on the dates of respective withdrawals thereof for said governmental purposes would be, or were, if they had not been withdrawn and if surveyed, available to the Railway Company, by indemnity selection, to satisfy said deficiency in said grant of May 31, 1870, on the date of each such withdrawal. If said lands had not been so withdrawn they would also have been available for acquisition under the public land laws. The following statement shows the exhibit number, date of withdrawal, purpose of withdrawal, number of acres, and reference to proclamation or executive order under which said withdrawals in first indemnity limits in Washington were made:

Pff. Ex.	Date	Purpose	Order	Acres
223	Mar. 1, 1898	Forest	Proc. 400, 401	127,595.31
224	Dec. 18, 1902	"	Interior Dept	22,538.98
225	Aug. 27, 1906	"	" "	5,120.00
226	July 2, 1910	Power	Executive Order	393.05
227	Dec. 15, 1913	"	" "	80.00
	Total			155,727.84

(g) All the lands embraced in the withdrawals herein found to be invalid are nonmineral lands. No mineral base is assigned by defendants for any of said 155,727.84 acres.

1082 (h) A deficiency in the grant of 1870 continued from March 1, 1898, to the date of the last withdrawal on December 15, 1913, and still exists. During all of said period patented lands within the place limits and all indemnity limits, plus all other lands within place limits not patented but which passed under the grant, and also all odd-numbered sections in all indemnity limits which the Railway Company was entitled to select under regulations of the Secretary of the Interior and the United States Land Department, did not equal the area of all the odd-numbered sections granted by said Joint Resolution of May 31, 1870. This state of facts existed on June 5, 1924, and June 25, 1929, and still exists.

(i) Even if the Railway Company received said 155,727.84 acres, there would still be a deficiency in the grant of 1870 of 1,067,902.61 acres, counting the Overlap as a loss, and of 430,524.05 acres if said area be not so counted.

1083. CONCLUSIONS

(a) In determining the validity of said withdrawals in indemnity limits neither land unsurveyed at date of withdrawals nor lands thereafter classified as mineral can be counted.

(b) The withdrawals of 155,727.84 acres in first indemnity limits of Washington, as stated in finding (f), were and are invalid, and the proclamations and orders, so far as they purport to authorize said withdrawals, were and are invalid.

(c) Defendants are entitled to just compensation provided for by the Act of Congress of June 25, 1929, for said 1,555,727.84 acres of withdrawn and expropriated lands in first indemnity limits in Washington.

(d) Title of the United States to all of said withdrawn lands should be quieted and freed from all claims of defendants and each of them, arising out of the Act of July 2, 1864 and the Joint Resolution of May 31, 1870, and acts supplementing or amending the same.

1084

III

TACOMA OVERLAP

FINDINGS

(a) The line of railroad authorized by the Joint Resolution of May 31, 1870, was constructed in all respects in accordance with the Joint Resolution from Portland to Puget Sound, and was examined and accepted by the President of the United States. The date of last definite location of said line of railroad was September 22, 1822. Construction was completed August 22, 1883.

(b) The Cascade Branch of said railroad extends from Pasco, Wash., cross the Cascade Range to Tacoma, Wash., in an easterly and westerly direction. That portion of said railroad between Yakima River near Swauk Creek to Tacoma on Puget Sound was definitely located in 1884.

(c) Lateral place and first indemnity limits were laid down on both sides of said Cascade Branch for its entire length and the terminal line therefor was drawn generally north and south through Tacoma at right angles to said lateral limits.

(d) That portion of the line authorized by the Joint Resolution from Kalama to Tacoma was definitely located on May 14, 1874, and construction completed May 12, 1874. Place and first indemnity limits were established on both sides for the entire length of said line and the north terminal line was drawn through Tacoma substantially at right angles to the constructed line.

(e) At Tacoma the Cascade Branch and the Portland-Tacoma line meet to form a rough right angle. Place limits of
1085 the Cascade Branch conflict with or overlap place limits of the Tacoma-Portland line. The Overlap forms a quadrilateral containing 637,580.99 acres of odd-numbered sections.

(f) The Cascade Branch was authorized and constructed and the grant of lands therefor made and earned under the Act of July 2, 1864. The line from Portland to Tacoma was authorized and constructed, and the grant therefor made and earned under the Joint Resolution of Congress of May 31, 1870.

(g) The railroad company has received under the Act of 1864 the entire area of the Overlap except 32,354.86 acres, which were lost to the grant of 1864 to settlers, and has received indemnity for a portion of said 32,354.86 acres.

1086 (h) At date of final location of said Portland-Tacoma line, September 22, 1882, the status of the said grant by

the Joint Resolution of May 31, 1870, in Washington, was as follows:

		Acres
Area of place limits (40 sections per mile):		
(a) excluding area of Tacoma Overlap		1,761,912.26
(b) including area of Tacoma Overlap		2,399,398.25
Chargeable to grant in primary limits	1,368,109.16	
Vacant (surveyed and unsurveyed) in first indemnity limits	432,509.79	
		1,800,618.95
Deficiency in Washington (including Tacoma Overlap)		598,874.30
Excess of vacant lands in first indemnity limits over losses in Washington (excluding Tacoma Overlap)		38,706.69

There were only 750 acres of land classified as mineral lands in the entire indemnity belt of the grant of 1870, of which only 480 acres were surveyed on December 31, 1897.

The words "Chargeable to grant in primary limits," as above used, mean the entire amount of lands in place limits which have been or will be received under the grant of 1870. The words "Vacant (surveyed and unsurveyed)" mean lands available for selection in first indemnity limits, when surveyed.

(i) Second indemnity belts were laid down in Washington and Oregon by the Secretary of the Interior and diagrams thereof were filed with the proper local land offices on November 10, 1906.

1087 (j) On March 1, 1898, by proclamation of the President of the United States (29 Stat. *l.* 893, 986, 901; 30 Stat. L. 11, 34) and on December 18, 1902, and August 27, 1906, by order of the Secretary of the Interior, there were withdrawn and placed in the Rainier, Olympic, and Columbia national forests 213,001.66 acres of odd-numbered sections of lands in second indemnity limits (as erroneously laid down) of Washington under the grant by the Joint Resolution of May 31, 1870, as follows:

Pff. Ex.	Date	Purpose	Acres
220	March 1, 1898	Forest	199,668.18
221	Dec. 18, 1902	"	11,160.00
222	Aug. 27, 1906	"	2,233.48
			213,001.66

Said 213,001.66 acres were on June 5, 1924, within the exterior limits of said Rainier, Olympic, and Columbia National Forests. The Railway Company now claims compensation for 16,240 acres of this area as being lands within the first indemnity limits of the grant of July 2, 1864, as well as under the grant of May 31, 1870.

1088 (k) There has been at all times since the date of final location, September 22, 1882, a deficiency in the entire grant of 1870. All the lands in place limits of Oregon had been lost to the grant. The deficiency in that state exceeded the surplus in Washington on September 22, 1882, in the amount of 389,238.76 acres. On and immediately prior to March 1, 1898, December 18, 1902, and August 27, 1906, the deficiency in the entire grant and its status was as follows:

Total area lost to grant, including Tacoma Overlap (acres)	Date for which deficiency shown	Area selected by company and vacant surveyed, first, second, and mineral indemnity limits	Deficiency if only surveyed lands counted	Area vacant unsurveyed first, second, and mineral indemnity limits	Deficiency counting both surveyed and unsurveyed lands
1,456,329.54	12-31-1897	263,340.05	1,195,989.49	429,934.03	766,055.46
	12-31-1898	261,370.80	1,197,958.74	92,175.63	1,105,783.11
	12-31-1901	258,517.91	1,200,811.63	88,610.16	1,112,201.47
	12-31-1902	235,906.93	1,223,422.61	14,041.65	1,209,380.96
	12-31-1905	234,705.12	1,224,624.42	6,600.61	1,218,023.81
	12-31-1906	230,159.37	1,226,170.17	1,125.72	1,228,044.45

The area of the Tacoma Overlap is 637,580.99 acres. There was a deficiency on each of the dates above shown whether or not said Overlap area be counted as a loss.

1089 (l) On and before the dates of withdrawals of March 1, 1898, December 18, 1902, and August 27, 1906, the area of vacant nonmineral survey land available for selection in all indemnity limits of the 1870 grant was as follows:

	First indemnity entire grant (acres)	Second indemnity Washington (acres)	Second indemnity Oregon (acres)	Mineral indemnity entire grant (acres)
March 1, 1898	29,184.01	7,448.33	22,040.07	3,233.66
December 31, 1901	26,437.18	929.94	9,002.55	3,233.66
December 31, 1902	23,389.41	433.63	8,605.51	3,233.66
December 31, 1905	7,587.78	4,069.87	5,610.16	3,233.66
December 31, 1906	3,340.95	162.43	5,821.97	3,233.66

The Railway Company had unused subsequent losses alone in the State of Washington in an amount more than sufficient to select all said available vacant surveyed lands in the second indemnity limits in that State on and before each of said respective dates of withdrawal, as follows:

	Acres
December 31, 1897	128,302.36
December 31, 1898	128,178.62
December 31, 1901	128,076.63
December 31, 1902	128,076.63
December 31, 1905	127,558.63
December 31, 1906	126,749.34

The Railway Company also had unused losses (exclusive of said Overlap area) greatly more than sufficient to select all of the 61,906.07 acres of vacant available lands in all indemnity limits, as shown in finding (c), p. 22 hereof, as follows:

	Prior losses entire grant exclusive of Tacoma overlap	Subsequent losses Washington	Subsequent losses Oregon	Mineral losses entire grant
December 31, 1897	157,029.42	128,302.36	278,188.81	3,233.66
December 31, 1898	157,029.42	128,178.62	278,188.81	3,233.66
December 31, 1901	157,029.42	128,076.63	278,188.81	3,233.66
December 31, 1902	157,029.42	128,076.63	278,188.81	3,233.66
December 31, 1905	157,029.42	127,558.63	278,188.81	3,233.66
December 31, 1906	157,029.42	126,749.34	278,188.81	3,233.66

On December 31, 1935, the Railway Company had unused prior losses (exclusive of said Overlap area) to the amount of 157,029.42 acres and also had 278,108.80 acres of Oregon subsequent losses applicable to the selection of first indemnity lands in Washington.

1090 (m) The condition described in the preceding paragraph (k) continued at all times since said lands were withdrawn, up to and including June 5, 1924, and at all times since.

(n) The area of the odd sections that had been "granted, sold, reserved, occupied by homstead settlers, preempted, or otherwise disposed of subsequent to the passage of the Act of July 2, 1864" in the State of Washington within place limits of the 1870 grant was 224,386.10 acres. There have been patented to the company and charged to the grant as selected or vacant lands in second indemnity limits of Washington, 1,394.02 acres.

(o) On December 31, 1935, and at all times since, defendant had 124,548.11 acres of subsequent losses in the State of Washington and had available to select the balance of 88,453.55 acres of said withdrawn forest lands in second indemnity limits, unused nonmineral losses in Washington, (exclusive of the Overlap), amounting to 62,840.25 acres. It also had available at said time 28,436.14 acres of which 14,462.11 acres were prior and 13,974.03 acres were subsequent losses in the 1870 grant in Washington formerly used to make selections in the 1864 grant. Said 28,436.14 acres were erroneously used as base to select lands in the 1864 grant, and said error has been corrected by crediting the acreage back to the 1870 grant and charging to the 1864 grant an equal number of losses in that grant. In addition, defendant has available the loss of odd sections in the Tacoma Overlap, if any thereof be required, to select any or all of said 213,001.66 acres of withdrawn forest lands in the second indemnity limits.

1091 CONCLUSIONS

(a) The Joint Resolution of May 31, 1870, authorized the laying down of second indemnity belts in Washington for the

(a) The Joint Resolution of May 31, 1870 authorized the railroad constructed under said resolution in the event of a deficiency at final location.

(b) Defendants are not entitled to indemnity under the Joint Resolution of 1870 for the Overlap area, and, as the grant by said resolution in Washington, was not deficient at date of final location of the line authorized by said joint resolution, second indemnity limits were not authorized in Washington, and the withdrawals of 213,001.66 acres of lands in second indemnity limits in said state, except 16,240 acres claimed by the Railway Company as being within the first indemnity limits of the grant of July 2, 1864, as well as under the grant of May 31, 1870, were and are valid.

(c) The title of the United States in and to all of said 213,001.66 acres of withdrawn lands, except said 16,240 acres thereof claimed by the Railway Company as being within the first indemnity limits of the grant of July 2, 1864, as well as under the grant of May 31, 1870, should be freed from all claims of the defendants and each of them arising out of the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, and acts amending or supplementing the same.

(d) Defendants are entitled to use prior nonmineral losses as well as subsequent losses as base for selecting lands in second indemnity limits in the same state, provided that the total acreage selected in said second indemnity limits of any state does not exceed the total amount of subsequent losses in said state.

1092 IV

PORTAGE CONFLICT

FINDINGS

(a) By Act of May 5, 1864, Congress granted lands to the State of Wisconsin in aid of the construction of a railroad from Portage to Bayfield and thence to Superior, all in the State of Wisconsin. The grant was transferred by the State to the Portage, Winnebago & Superior Railroad Company. That company on November 10, 1869, definitely located the entire authorized line but actually constructed only the portion between Portage and Ashland. The situation is shown on map, Ptf. Ex. No. 76. The grant pertaining to the constructed portion was earned and

received by the Portage Company, but the grant for the unconstructed portion was forfeited by the Act of September 29, 1890.

(b) The grant to the Northern Pacific Railroad Company by the Act of July 2, 1864, was junior to the grant to the Portage Company. On July 5, 1882, and November 20, 1884, the Northern Pacific definitely located that part of its railroad between Ashland and Superior as shown on said Exhibit 76 and the road was thereafter built substantially on that line.

(c) The primary limits of the grants for the benefit of the respective roads in part overlap from Ashland, Wisconsin, to Superior, Wisconsin. The route of the Northern Pacific Railroad as authorized by the Act of July 2, 1864, is upon the line of the Portage, Winnebago & Superior Railroad from Bayfield, Wisconsin, to Superior, Wisconsin, to aid in the construction of which lands had theretofore been granted by the United States. As far as the routes are upon the same general line, the amount
1093 of lands so granted to the Portage Company was 347,141.24 acres, indicated as area A upon Government Exhibit 76. The route of the Northern Pacific Railroad Company is not upon the same general line as the portions of the route of said Portage Company, to aid in the construction of which, areas B and C, shown on said exhibit, were granted.

(d) In the administration of the Northern Pacific grant the area of the overlap on the Portage grant was treated as a loss to the Northern Pacific Company and that company has received indemnity in the indemnity limits of its grant in Minnesota, North Dakota, Montana, and Wyoming, the company assigning therefor as base odd-numbered sections within said overlapping area totaling 417,400.46 acres, the combined areas A, B, and C.

Patents were issued at various times between 1890 and 1923 to the Northern Pacific Railroad Company or Northern Pacific Railway Company, and said indemnity lands were sold and disposed of prior to December 19, 1923.

(e) Secretary Hoke Smith, in 21 L. D. 412, decided that the eastern terminus of the railroad was at Superior, Wisconsin. In consequence of this decision the railway company was required to submit other losses in support of said selections. After the decision of the Supreme Court in the eastern terminous case, 177 U. S. 435, said other base was released and the Portage, Winnebago & Superior conflict base was reinstated as valid base to support said selections.

(f) It was stated by plaintiff's counsel of record that the defendant Northern Pacific Railway Company may retain said lands selected with the 347,141.24 acres supposed Portage,
1094 Winnebago & Superior losses provided the said Railway Company supply other proper base in support of said selections.

(g) Subsequent to the court's order of March 22, 1938, overruling exceptions to the Master's report of July 26, 1937, the defendant Railway Company has submitted new schedules showing the assignment of nonmineral base to 54,895.94 acres and mineral base to 291,189.16 acres of the lands which have heretofore been patented to the Northern Pacific Railway Company as indemnity for said supposed losses within said Area A. This assignment of base is shown on N. P. Exhibit C introduced in evidence. The 291,189.16 acres of lands to which mineral base is assigned are noncoal and noniron lands.

CONCLUSIONS

347,141.24 acres should be deducted from the amount of lands granted to the Northern Pacific Railroad Company by the Act of July 2, 1864, and the lands selected in lieu thereof should be charged to the grant. No deductions should be made on account of Areas B and C. The lands within odd-numbered sections in said Area A were not comprehended by the grant to the Northern Pacific Company and for that reason did not constitute valid base for the selection of any indemnity lands. The Secretary of the Interior erred in accepting the losses as valid base for said indemnity selections. The base assigned by defendant to support selections made with said 347,141.24 acres is valid base and approval of said selections and patents issued for lands so selected should be validated and confirmed.

1095

V

MONTANA PLACE LIMITS ERROR

FINDINGS

At the time the road was definitely located, the Commissioner of the General Land Office made an error in laying down the northern and southern lateral limits of the grant through Montana. The result of correcting said error was to locate in the first indemnity limits of the grant certain lands aggregating 5,785.58 acres, described in Government Exhibit 301, which were formerly considered place lands. Of such area of 5,785.58 acres 1,838.96 acres have been patented to the company and 3,946.62 acres have been treated as lost to the grant, of which 3,706.62 acres have been used as base for the selection of lands in the indemnity limits. Government Exhibit A, offered in evidence before the court subsequent to the first hearing on exceptions to

the Master's report of July 26, 1937, shows the descriptions of the lands so patented and the descriptions of the lands so used as base, together with the descriptions of the indemnity lands obtained by the use of such supposed base. The defendants have since the said hearing on exceptions to the Master's report submitted to this court a tabulation (N. P. Exhibit D herein) showing an assignment of proper base to the lands obtained as indemnity for said area of 3,706.62 acres and 1,838.96 acres.

1096 CONCLUSIONS

The lands comprising said area of 1,838.96 acres being located within the first indemnity limits of the grant were erroneously patented to the railway company as primary lands, and valid unused base should now be assigned to them. The lands comprising said area of 3,706.62 acres, being located within the indemnity limits of the grant, did not constitute valid base for the selection of any indemnity lands. The lands described in Government Exhibit A as being indemnity lands selected by the use of said area of 3,706.62 acres as base did not rest on valid base. Such errors should be and are corrected by the assignment of proper unused base to the said areas of 1,838.96 acres and 3,706.62 acres, as shown in Northern Pacific Exhibit D.

1097 V½

PORTLAND AND AINSWORTH TERMINAL ERRORS

FINDINGS

(a) The Northern Pacific Railroad Company definitely located its line under the grant of 1870 between Portland, Oregon, and Kalama, Washington, September 22, 1882. It thereafter constructed that portion of said line substantially as definitely located except for a distance of approximately one mile at or near Portland. Thereafter, in the administration of the grant, plaintiff patented to the Northern Pacific Railroad Company or Northern Pacific Railway Company approximately 4,?11.47 acres in place limits and first indemnity limits. Said patents were issued by mistake and inadvertence in that the Land Department of plaintiff overlooked or did not know that said railroad had not been actually constructed for the entire distance for which it had been definitely located.

(b) In the administration of the grant of July 2, 1864, the Secretary of the Interior established a terminal line extending across the primary and indemnity limits of said grant. Through

error and mistake in fixing said terminal line at Ainsworth there were included within said terminal line and patented to the Northern Pacific Railroad Company or Northern Pacific Railway Company 61,779.05 acres in place limits and first indemnity limits for a distance of approximately three miles beyond the point at which the constructed line actually terminated.

(c) By stipulation dated the 23rd day of March, 1939, defendants have agreed to accept a charge in the final accounting in such amount as the court may determine, as more
1098 fully appears from said stipulation which is refererd to and made a part hereof.

CONCLUSIONS

Defendant Northern Pacific Railway Company should compensate the United States for the value of said lands as provided by said stipulation above referred to, and the decree should so provide.

1099

VI

LIEU SELECTIONS

FINDINGS

Under the Act of July 1, 1898, and other acts for the relief of settlers, defendants have selected 38,485.23 acres in the indemnity limits of the grant of July 2, 1864, and 8,568.29 acres under the grant of May 31, 1870, in lieu of lands relinquished under said relief acts. The lieu selection rights by which such selections were made were charged to the defendants.

CONCLUSIONS

The deficiency in the grants of July 2, 1864, and May 31, 1870, should not be decreased by reason of the selection of said 38,485.23 acres and said 5,568.29 acres of lands in the indemnity limits, selected in lieu of lands relinquished under said relief acts.

1100

VII

QUANTITY OF DEFICIENCY, GRANT OF 1864, AS OF DECEMBER 31, 1935

FINDINGS

On p. 36 of the Master's second report, filed July 26, 1937, he found a deficiency in the grant of July 2, 1864, as of December

31, 1935, of 2,220,224.17 acres. The court's rulings upon the exceptions and the stipulations of counsel, duly approved, results in a restatement of the deficiency as found by the Master. The correct deficiency in the grant of July 2, 1864, as of December 31, 1935, is 2,307,403.03. The figure for the deficiency in the 1864 grant is due to correcting the Master's finding by adding 61,779.05 of place and indemnity lands in the Ainsworth terminal error, 4,040.47 acres of selected mineral indemnity in place limits in the former Crow Indian Reservation, 27,109.46 acres of selected mineral indemnity lands in place limits in various states not included in the former Crow reservation. A mistake of the Master in stating the acreage in the Montana lateral limits error has also been corrected.

QUANTITY OF DEFICIENCY, GRANT OF 1870, AS OF DECEMBER 31, 1935

FINDINGS

In the grant of 1870 the Master found (p. 140) the deficiency to be as of December 31, 1935, 581,292.47 acres. There is a clerical error in this figure of 200 acres of selected lands and 2.43 acres of vacant, surveyed lands in second indemnity limits in Washington, which, under the court's ruling on the Overlap, are
1101 not chargeable to the 1870 grant. The ruling of the court on plaintiff's amendment to the complaint, relating to the Portland terminal error, results in increasing the deficiency in the 1870 grant by 4,311.47 acres and by 529.6[illegible] acres of unpatented mineral indemnity in place limits. The correct deficiency as of December 31, 1935, in the grant of 1870 was 586,328.06 acres. The deficiency stated does not include any of the odd sections in the Tacoma Overlap.

The figures for the deficiency in both the 1864 and 1870 grants are as computed from the latest figures available at the time the Master made his report. There has been no change in said deficiency figures since December 31, 1935.

1102 VIII.

AGRICULTURAL LANDS

The court approves and adopts the Master's findings of fact and conclusions of law contained under the heading, "Lands Selectable for Mineral Losses: Meaning of Agricultural lands", and his formal findings and conclusions under the heading, "V. Agricultural Lands".

1103

IX

LANDS IN ABSAROKA AND BEARTOOTH FORESTS

FINDINGS

(a) There were withdrawn and placed in the Absaroka and Beartooth National Forests and other Government reservations in the place limits in the grant in Montana 314,544.06 acres, embracing the following list of withdrawals:

WITHDRAWALS IN PLACE LIMITS

Ptf. Ex.	Date	Purpose	Order	Acres
185	Sept. 4, 1902	Forest	Proc., 32 Stat. 2027	304,331.14
186	May 4, 1904	"	Proc., 33 Stat. 2344	9,565.47
187	Nov. 3, 1906	"	Proc., 34 Stat. 3291	240.00
188-A	Aug. 9, 1909	Power		299.71
188-B	Nov. 23, 1914	Administrative		34.42
188-C	Dec. 6, 1915	Petroleum	Executive Order	73.32
		Total withdrawn in place limits		314,544.06

At the time of each of said respective withdrawals both first and mineral indemnity limits were deficient and said 314,544.06 acres of withdrawn lands were unoccupied and unappropriated lands and are non-mineral, non-coal, and non-iron in character.

(b) Said area of 314,544.06 acres within place limits of the grant of 1864 in Montana was part of the Crow Indian Reservation established by treaty of May 7, 1868, (15 Stat. 649). The railroad was definitely located through these lands on June 27, 1881. The lands were lost to the grant, and the railroad company used the losses for selection of other lands and received patents for such lieu selections. On April 11, 1882, Congress ratified an agreement with the individuals and heads of families of the Crow Tribe of Indians by which these lands together with a large additional area of said Crow lands were purchased
1104 from said Indians and ceded by them to the United States for a consideration of $750,000 and other considerations (22 Stat. 42).

(c) Between 1882, the date the lands were restored to the public domain, and September 4, 1902, 14,075.47 acres of said 314,544.06 acres were surveyed. The company did not attempt to select such of said restored lands as were surveyed, in satisfaction of mineral losses.

(d) Attorney General Wickersham on July 24, 1912, 41 L. D. 571, advised the Secretary of the Interior that mineral indemnity selections of unoccupied and unappropriated agricultural lands within the place limits of the grant were authorized. The Rail-

way Company did not attempt to make selections of restored lands in place limits in lieu of mineral losses until 1907, and such selection rights were not recognized by the Land Department until said decision of Attorney General Wickersham.

(e) 67,685.49 acres of lands in place limits and within said Crow Indian area, restored to the public domain as above stated, which were not withdrawn and placed in forest reserves, were selected by the Railway Company as indemnity for mineral losses, and, subsequent to Attorney General Wickersham's decision of July 24, 1912, patents were issued to the Railway Company for 63,295.02 acres thereof, and selections are now pending for 4,380.47 acres of such lands.

By stipulation dated the 23rd day of March 1939, defendants have agreed to relinquish and withdraw claim to patents for said 4,380.47 acres, with the exception of 340 acres. Plaintiff has by said stipulation waived its claim for cancellation of patents to said 63,295.02 acres or any other relief with respect thereto and has agreed to deliver patents to defendant Railway Company for said 340 acres. The legal descriptions of all of said lands are attached to said stipulation filed herein.

1105 CONCLUSIONS

(a) The lands comprising said area of 314,544.06 acres were excepted from the grant of July 2, 1864 because they were reserved under the treaty of May 7, 1868 establishing the Crow Indian Reservation. After the purchase from the Indians, the United States could lawfully dispose of such lands as it saw fit without infringing on any of the defendants' rights. Withdrawals of such lands were and are valid.

Said lands are not subject to selection by the defendants under any of the indemnity provisions of the grant, and defendants are not entitled to select or to be compensated by plaintiff for said area or any part thereof.

(b) Defendant Railway Company's title to said 63,295.02 acres should be quieted and freed from any and all claims of plaintiff thereto or for compensation therefor whatsoever, and patents should be issued by plaintiff to defendant Railway Company for said 340 acres.

1106 X

Fort Ellis Lands

FINDINGS

(a) The Fort Ellis Military Reservation in Montana was created prior to the definite location of the road opposite it. The reservation lay within the place limits of the grant so the lands

included in it were lost to the grant under the provisions of the granting act. Indemnity has been obtained by the company for such loss. The fort was abandoned in 1886 under the provisions of the Act of July 5, 1884 (23 Stat. 101), entitled "An Act to provide for the disposal of abandoned and useless military reservations", providing for the survey, sale and appraisement of the lands within any military reservation which might become useless for military purposes. Later, by the Act of February 13, 1891 (26 Stat. 747) entitled, "An Act to provide for the disposal of abandoned Fort Ellis Military Reservation in Montana, under the Homestead Law, and for other purposes", Congress granted one section to the State of Montana for a military camp ground and authorized the State to make certain other selections and provided further:

"That, if any portion of said reservation shall remain unselected by said State for a period of one year after the approval of the survey, that portion remaining unselected shall be subject to entry under the general land and mining laws of the United States."

The lands in question, aggregating 3,300.82 acres, were restored under this act. The company claims compensation for them.

1107 CONCLUSIONS

(a) The former Fort Ellis Military Reservation lands comprising 3,300.82 acres were not restored to the public domain, and therefore, were not selectable by the company as indemnity. None of the defendants is entitled to any compensation for said lands or any of them. The withdrawal of said lands is valid.

1108 XI

NORTHERN CHEYENNE INDIAN RESERVATION LANDS.

The court approves and adopts the Master's findings of fact and conclusions of law contained under the heading, "Lands in Northern Cheyenne Indian Reservation, 52,050.93 acres", and his formal findings and conclusions under the heading, "VIII. Northern Cheyenne Indian Reservation."

1109 XII

LANDS PATENTED TO HOMESTEADERS AFTER WITHDRAWAL

FINDINGS

3,710.31 acres listed in Plaintiff's Exhibit 288, situated in Montana, Idaho, Wyoming, and Washington, in first or second

indemnity limits, were withdrawn and placed in various national forests by withdrawals hereinbefore listed. Said lands were filed on by settlers under the forest homestead laws prior to June 5, 1924, and after June 5, 1924, patents were issued therefor. These withdrawn lands were on June 5, 1924, within the exterior limits of said national forests and on the dates of respective withdrawals thereof were available if they had not been withdrawn and if surveyed to the Railway Company by indemnity selection to satisfy the deficiency in the grant of July 2, 1864, on the date of each such withdrawal. Said lands would also have been available if not withdrawn to acquisition under the public land laws. Since the conclusion of the hearings before the Master, the defendant Northern Pacific Railway Company has offered in evidence revised tabulations of the withdrawn lands for which it asks compensation as shown by said revised tabulations. It now lists 2,480.91 acres of said 3,710.31 acres for which it asks compensation.

CONCLUSIONS

The Railway Company is entitled to compensation for said 2,480.91 acres of said lands, notwithstanding that the plaintiff, after withdrawal, had parted with its title thereto.

1110 XIII

SUBSTITUTION OF BASE

FINDINGS

(a) In the course of the administration of the grant of July 2, 1864, the Northern Pacific Railroad Company assigned Montana subsequent losses to the extent of 584,324.90 acres and Idaho subsequent losses to the extent of 193,818.20 acres for the selection of lands in the first indemnity limits of the grant. At the time said selection lists were filed, settlers were settling upon and acquiring vacant public lands within such indemnity limits.

(b) The selections were made under the nonmineral indemnity provisions of the Act of July 2, 1864. In the publication of that Act in Volume 13 of the United States Statutes at Large, the words "and within fifty miles thereof" were omitted from the mineral indemnity proviso in Section 3 thereof. There was, however, no misunderstanding or mistake of law or fact on the part of the Government or the defendants as to the correct language of the Act. Defendants were not misled or in any degree influenced in the use of their unsatisfied losses on account of such omission, nor has it been claimed by the defendants or any of them at any time that the making of such selections was the

result of or in any way influenced by any mistake in the publication of said statute or by any other mistake of law or fact. It has not at any time been claimed by the defendants or any of them that the selection of said lands in the first indemnity limits is or was erroneous for any reason.

1111 (c) The selection lists by which such selections were made were examined by the Secretary of the Interior and patents for the lands so selected were issued to the company during the years from 1883 to 1895, inclusive, but principally during the years 1883 to 1887, inclusive. It is not claimed that the issuance of said patents was erroneous. The lands so patented were to a major extent disposed of by the company from time to time beginning in the eighteen eighties and continuing down to the present time.

(d) At the time said subsequent losses were so used, the mineral classification provided for by the Act of Congress of February 26, 1895 (28 Stat. 683), had not been completed. It was commenced in 1895 and not substantially completed until 1905. After 1896, 3,077 acres of Montana and 28,604.40 acres of Idaho subsequent losses were so used.

(e) Between February 26, 1895, and December 31, 1935, but principally between 1895 and 1905, 3,812,416.33 acres of place lands in Montana and Idaho were classified as mineral under said Mineral Classification Act.

(f) In the administration of the Northern Pacific grants, the Secretary of the Interior has permitted substitution of base only when the original selection lists were still pending and undetermined in the department, or when the department was correcting an error that it had itself induced.

(g) On November 25, 1910, the Railway Company requested the Commissioner of the General Land Office to permit substitution of mineral losses in place of Montana subsequent losses which had been used in two lists known as Bismarck lists 54 and 56 in the selection of lands in the first indemnity limits in North

1112 Dakota. The requests are contained in Government Exhibit 294. The Commissioner of the General Land Office denied the requests, such denial being contained in Government Exhibit 295. No appeal was taken by the company to the Secretary of the Interior nor did the company ever take any steps to have such action reviewed by the courts.

(h) The defendants have not pleaded any facts upon which to base a claim of right to substitution of base and have not prayed for such relief but have offered in evidence in this case over the objection of the plaintiffs, exhibits upon which they base a request to this court to permit the substitution of 584,293.94 acres of mineral base in place of 584,324.90 acres of said Montana sub-

sequent losses which were used in the first indemnity limits of the grant and to permit the substitution of 79,202.21 acres of mineral base and 114,415.11 acres of nonmineral base in place of 193,818.20 acres of said Idaho subsequent losses which were used in the first indemnity limits of the grant. In such request said defendants are asking that base be substituted on approximately 15,000 acres of lands which had been obtained by selections made in Bismarck lists 54 and 56 on which the request of November 25, 1910, had been denied.

CONCLUSIONS

Defendants' request for substitution of prior or mineral losses for subsequent losses heretofore used in the first indemnity limits of the grants is without merit. It is beyond the power of the court to grant it and it should be denied. The Master's conclusion is disapproved.

1113

XIV

80 Acres of Vacant Lands in Grant of 1870

FINDINGS

There are 80 acres of lands described as N½NW¼, Sec. 7, T. 12 N., R. 9 E., Washington, remaining unsurveyed in the first indemnity limits of the grant of 1870, which are not within any Government reservation.

CONCLUSIONS

This tract of land should be patented to the company and charged to the grant of 1870.

1114

XV

Mineral Lands

FINDINGS

The lands described in Government Exhibit No. Gov. B filed in this case are mineral in character.

CONCLUSIONS

The defendants and none of them are entitled to patents or compensation for any of the lands described in Government Exhibit No. Gov. B, and the plaintiff is entitled to have its title in and to said lands quieted in it.

1115

XVI

1,641.27 Acres in Former Fort Ellis Military Reservation

FINDINGS

There are, within the boundaries of the former Fort Ellis Military Reservation in Montana, created by Executive Order of November 25, 1873, 1,641.27 acres of lands which were classified as mineral by the Bozeman Board of Mineral Commissioners in July 1895 and approved, as such, by the Secretary of the Interior on July 14, 1896. These losses were assigned by the defendant Railway Company as mineral base for the selection of lands in the place limits of the grant in Montana. Through inadvertence the losses were designated on the records of the General Land Office as Montana subsequent losses. The defendant Railway Company now requests this court to permit the substitution of other mineral losses in place of such 1,641.27 acres of mineral losses and to now use said 1,641.27 acres as unused Montana subsequent losses and assign them to lands in the second indemnity limits in Montana.

CONCLUSIONS

There is no merit to such request and it should be denied.

1116

XVII

Lands for Which the Defendant Northern Pacific Railway Company Is Entitled to Compensation From the United States

FINDINGS

(a) Subsequent to the argument upon the exceptions to the report of the Special Master of July 26, 1937, and after the court by its order of March 22, 1938, had directed the parties to prepare and submit proposed findings of fact and conclusions of law in conformity with the rulings of the court upon the several exceptions to the Master's report, the defendants prepared and offered in evidence in this case N. P. Exhibits E, F, G, and H, containing the legal descriptions of the lands for which the Railway Company now asks compensation from the plaintiff. The schedules are entitled as follows:

N. P. Exhibit E—Schedule of lands within first indemnity limits of the grant of July 2, 1864, embraced within the exterior boundaries of national forests or other governmental reservations

on June 5, 1924, expropriated by Act of June 25, 1929 (46 Stat. 41), for which the Northern Pacific Railway Company is entitled to compensation and the United States to have its title quieted in accordance with the provisions of the Act of June 25, 1929—State of Minnesota, State of Montana, State of Wyoming, State of Idaho, State of Washington, State of Oregon.

N. P. Exhibit F—Schedule of lands within second indemnity limits of the grant of July 2, 1864, embraced within the exterior boundaries of national forests or other governmental reservations on June 5, 1924, expropriated by Act of June 25, 1929 (46 Stat. 41), for which the Northern Pacific Railway Company is entitled to compensation and the United States to have its title quieted in accordance with the provisions of the Act of June 25, 1929—State of Wisconsin, State of Minnesota, State of Montana, State of Idaho.

N. P. Exhibit G—Schedule of lands within mineral indemnity limits of the grant of July 2, 1864, embraced within the exterior boundaries of national forests or other governmental reservations on June 5, 1924, expropriated by Act of June 25, 1929 (46 Stat. 41), for which the Northern Pacific Railway Company is entitled to compensation and the United States to have its title quieted in accordance with the provisions of the Act of June 25, 1929—State of Wisconsin, State of Minnesota.

1117 N. P. Exhibit H—Schedule of lands within the first indemnity limits of the grant of May 31, 1870, embraced within the exterior boundaries of National forests or other governmental reservations on June 5, 1924, expropriated by Act of June 25, 1929 (46 Stat. 41), for which the Northern Pacific Railway Company is entitled to compensation and the United States to have its title quieted in accordance with the provisions of the Act of June 25, 1929—State of Washington.

(b) The losses assigned to the lands listed in said schedules are proper losses for the selection of said lands, and the lands are of the class and character subject to selection with the losses that are assigned to them.

CONCLUSIONS

The defendant Northern Pacific Railway Company is entitled to be compensated, under the provisions of the Act of June 25, 1929 (46 Stat. 41), for the lands described in N. P. Exhibits E, F, G, and H. The plaintiff is entitled to have its title in and to said lands quieted in it. The filing by defendants of said tabulations in conformity with the said order of March 22, 1938, and the court's approval thereof shall be and is without prejudice to the rights of the parties to this suit to a review on appeal of these findings and the decree to be entered pursuant thereto.

1118

XVIII

LANDS LISTED OR SELECTED BUT NOT PATENTED

FINDINGS

(a) N. P. Exhibits 149 to 158, inclusive, list 455,182.13 acres by legal subdivisions situated in the States of Wisconsin, Minnesota, North Dakota, Wyoming, Montana, Idaho, Washington, and Oregon. By stipulation dated March 23, 1939, there should be eliminated 26,089.85 acres of lands in place limits, selected with mineral losses. The following is a detailed summary of said exhibits after deducting said 26,089.85 acres of lands selected or charged in mineral indemnity limits:

LANDS LISTED AND SELECTED

	Grant of 1864 acres	Grant of 1870 acres	Total acres
Place Limits	351,576.68	10,586.11	362,162.79
First Indemnity Limits	27,881.79	1,069.69	28,951.48
Second Indemnity Limits	14,230.47	40.00	14,270.47
Mineral Indemnity Limits	723.96		723.96
Mineral Indemnity in Place Limits	340.00		340.00
	394,752.90	11,695.80	406,448.70

VACANT SURVEYED AND UNSURVEYED

Place Limits	21,626.09	19.20	21,645.29
First Indemnity Limits	137.33	160.06	297.39
Second Indemnity Limits	247.76	0.01	247.77
Mineral Indemnity Limits	347.53		347.53
Mineral Indemnity in Place Limits			
	22,358.71	179.27	22,537.98

SUMMARY

Place Limits	373,202.77	10,605.31	383,808.08
First Indemnity Limits	28,019.12	1,229.75	29,248.87
Second Indemnity Limits	14,478.23	40.01	14,518.24
Mineral Indemnity Limits	1,071.49		1,071.49
Mineral Indemnity in Place Limits	340.00		340.00
Total	417,111.61	11,875.07	428,986.68

1119 (b) 406,448.70 acres have been listed and selected but no patents have been issued. 394,752.90 acres are in the grant of 1864 and 11,695.80 acres are in the grant of 1870. Plaintiff's Exhibits 103 Rev. and 210 Rev. list these lands as chargeable to the grant. The Master has so found, except for 200 acres in second indemnity limits of Washington, grant of 1870, and plaintiff took no exception, and the report has been confirmed. Of said 406,448.70 acres there are 7,231.90 acres which had been withdrawn and placed in coal, phosphate, and petroleum reserves, and defendant Railway Company is entitled to patent only for the sur-

face of said lands under the Act of June 22, 1910 (36 Stat. 583) and the Act of July 17, 1914 (38 Stat. 509).

(c) 22,537.98 acres are vacant surveyed or unsurveyed, of which 22,358.71 acres are in the grant of 1864 and 179.27 acres are in the grant of 1870. These lands are charged to the grant on Plaintiff's Exhibits 103 Rev. and 210 Rev. The Master has so found, except as to 2.43 acres in second indemnity limits of Washington, grant of 1870. Plaintiff took no exception, and the Master's report has been confirmed.

(d) All lands described in said N. P. Exhibits 149 to 158, inclusive, are non-mineral lands, and the indemnity lands described in said exhibits for which mineral losses are assigned are non-mineral, non-coal, non-iron lands. All said lands except said 200 acres and said 2.43 acres are granted or indemnity lands and subject to the Act of July 2, 1864, and Joint Resolution of 1870.

1120 (e) There were 799.95 acres of land situated in the first indemnity limits of the grant of 1864 in the State of Washington that were selected by the Railway Company after June 5, 1924, which were withdrawn on October 10, 1924, and placed in Wenatchee National Forest. Said lands were selected with mineral base. Said lands are non-mineral, non-coal, and non-iron lands. All said lands are indemnity lands subject to the Act of July 2, 1864. The legal description of said lands is as follows:

	Area
Lots 3, 4, 5, 6, 7, 8, 9, 10 Sec. 15–27N–19E	252.77
Lots 1, 2, 3, 4, 5, 6, 7, 8, 9 Sec. 27–27N–19E	223.73
Lots 3, 4, 5, 6 Sec. 35 19E	113.22
Lots 9 Sec. 7–26N–20E	39.23
Lots 1, 2, 3, 4, 5, 6, 7, 8 Sec. 9–26N–20E	171.00
	799.95

CONCLUSIONS

(a) Title of defendant Railway Company to all of said lands except said 200 acres and said 2.43 acres should be quieted and freed from any and all claims thereto of plaintiff or those claiming under plaintiff, whatsoever, and patent should be issued therefor upon payment of the usual selection, survey and patent fees so far as unpaid.

(b) Title of plaintiff to said 200 acres, described as follows:

E½NE¼, E½SE¼, Sec. 21, 6 N, 5E, 160 acres.

SE¼NW¼, Sec. 5, 12 N, 9 E, 40 acres.

1121 and to said 2.43 acres, described as follows:

Lot 6, Sec. 23, 10 N, 11 W, 1.18 acres.

Lot 1, Sec. 17, 13 N, 11 W, 1.25 acres.

should be quieted and freed from any and all claims of defendants whatsoever.

1122

XIX

LANDS REFERRED TO IN SUBDIVISION XXIX-A OF AMENDED COMPLAINT

FINDINGS

(a) Plaintiff alleged that certain lands situated in place limits of the grant of July 2, 1864, in North Dakota were through error and mistake, patented to the company. Said lands were situated formerly within Fort Rice Military Reservation, Fort Lincoln Military Reservation, and Great Sioux Indian Reservation. It also was alleged that certain patented lands in Minnesota within the place limits of the grant of July 2, 1864, were included in a previous general route withdrawal or an indemnity withdrawal for the benefit of Lake Superior and Mississippi Railroad Company, or were embraced in certain outstanding uncancelled scrip at the date of definite location of that part of the road opposite said lands. It also was alleged that certain lands situated in first indemnity limits in North Dakota that formerly were embraced in Great Sioux Indian Reservation were through error and mistake patented to the Company. The patented lands herein referred to are described in tabulations A, C, and D of Exhibit EE attached to the amended bill of complaint. During the hearings before the Master counsel for plaintiff withdrew the claim for compensation for the patented lands formerly embraced in Fort Rice and Fort Lincoln Military Reservations and in Great Sioux Indian Reservation and consented that said lands should be charged to the grant as though properly patented. The Master discussed these concessions in his second report, pp. 23–25 inclusive. No exception was taken to anything contained

1123 in that part of the report. The patented lands alleged to have been embraced in withdrawals previously made for the benefit of the Lake Superior and Mississippi Railroad Company and in certain outstanding uncancelled scrip at the date of definite location of the road have been charged to the grant as if properly patented and no claim for compensation or other relief respecting said patented lands was made at any time in the hearings before the Master.

(b) Plaintiff also alleged that the Railway Company has selected certain lands and claims the right to select certain other lands that are situated in first indemnity limits of the grant of July 2, 1864, in the state of Washington, and that said lands are within the Yakima Indian Reservation created pursuant to a treaty between Yakima Indians and plaintiff, dated June 9, 1855. During the hearings before the Master counsel for defendants

conceded that some 22,000 acres described in Northern Pacific pleading Exhibit No. 2 are situated within Yakima Indian Reservation. Plaintiff conceded that 831.95 acres described in Northern Pacific pleading Exhibit No. 2 are outside the boundaries of said Yakima Indian Reservation and were properly selected by the Railway Company, and conceded that some 1,100 acres described in Northern Pacific pleading Exhibit No. 2 are situated outside said Yakima Indian Reservation and were withdrawn by proclamation or executive order for the purpose of a national forest and on June 5, 1924, were embraced within the exterior boundaries of a national forest. The Master, in his second report, p. 25, has found in accordance with the concessions as herein stated. No exception was taken to that
1124 part of the report.

(c) Plaintiff alleged that 334.88 acres described in Tabulation B of Exhibit EE attached to the amended complaint within the place limits of the grant of July 2, 1864, in Montana are situated within Flathead Indian Reservation created pursuant to a treaty between the Flathead Indians and plaintiff, dated July 16, 1855, and were erroneously patented to the company. Plaintiff charges said patented lands to the grant in its Exhibit 89 Rev. During the hearings before the Master no claim was made for compensation or other relief respecting said lands.

(d) Plaintiff alleged that 3,892.72 acres described in Tabulation E of Exhibit EE attached to the amended complaint and situated within first indemnity limits of the grant of July 2, 1864, in Washington formerly were reserved in pursuance of a treaty between Yakima Indians and plaintiff, dated June 9, 1855, as a reservation for said Indians; that said lands thereafter, by Act of Congress, were made subject to acquisition only under the homestead and settlement laws and that said lands were through error and mistake patented to the company. The plaintiff charged said lands to the grant as through properly patented. During the hearings before the Master no claim for compensation or other relief respecting said lands was made.

1125 CONCLUSIONS

(a) The patented lands in North Dakota that were formerly included in Fort Rice Military Reservation, Fort Lincoln Military Reservation, and Great Sioux Indian Reservation, and in Minnesota that were included in withdrawals previously made for the benefit of Lake Superior and Mississippi Railroad and embraced in certain outstanding uncancelled scrip at the date of definite location of that part of the railroad opposite said lands are chargeable to the grant of July 2, 1864, as if properly

patented and plaintiff is not entitled to any relief respecting any of said lands.

(b) The title of plaintiff should be quieted to the lands decribed in Northern Pacific pleading Exhibit No. 2, and that are situated within Yakima Indian Reservation. Northern Pacific Railway Company is entitled to patent upon payment of survey fees and other proper fees, if unpaid, to 831.95 acres of land in first indemnity limits of the grant of July 2, 1864, in Washington described in Northern Pacific pleading Exhibit No. 2. Defendants' rights respecting the 1,100 acres described in Northern Pacific pleading Exhibit No. 2, which are referred to in finding (b) are the same as its rights respecting lands withdrawn for national forests or other government reservations at a time when the indemnity limits were deficient and said lands are subject to said Railway Company's right of indemnity selection.

1126 (c) The 334.88 acres of patented land described in Tabulation B of Exhibit EE attached to the amended complaint are chargeable to the grant of July 2, 1864, as though properly patented and plaintiff is not entitled to any relief respecting said lands.

(d) The patented first indemnity lands in Washington described in Tabulation E of Exhibit EE attached to the amended complaint are chargeable to the grant of July 2, 1864, as though properly patented and plaintiff is not entitled to any relief respecting said lands.

Dated June 27, 1939.

J. STANLEY WEBSTER,
District Judge.

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1129 In United States District Court

For the Eastern District of Washington, Northern Division

In Equity No. E-4389

UNITED STATES OF AMERICA, PLAINTIFF

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION; NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION; NORTHERN PACIFIC RAILROAD COMPANY, AS REORGANIZED IN 1875; NORTHWESTERN IMPROVEMENT COMPANY, A CORPORATION; BANKERS TRUST COMPANY, A CORPORATION; GUARANTY TRUST COMPANY, A CORPORATION; CITY BANK FARMERS TRUST COMPANY, A CORPORATION; DEFENDANTS

[File endorsement omitted.]

Decree

(Filed June 27, 1939)

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, and pursuant to Section 5 of the Act of June 25, 1929, it is ordered, adjudged, and decreed as follows, viz:

I

That Northern Pacific Railroad Company is a corporation created by the Act of July 2, 1864, with authority to construct a railroad and telegraph line from a point on Lake Superior to Puget Sound, and by the Joint Resolution of May 31, 1870, auth-

orized to construct a railroad and telegraph line from a point at or near Portland to Puget Sound.

1130 II

That said lines of railroad and telegraph line were constructed in compliance with said Act of July 2, 1864, and said Joint Resolution of May 31, 1870, were examined by Commissioners appointed by the President, favorably reported and accepted by the President of the United States as in all respects in compliance with said Act and Joint Resolution; that said Northern Pacific Railroad Company has in all respects complied with its obligations and thereby became entitled to the land grant, the right to receive additional lands, and all other rights, grants, and privileges conferred by said Act of July 2, 1864, and said Joint Resolution of May 31, 1870.

III

That the mortgage dated July 1, 1870, executed by Northern Pacific Railroad Company to Jay Cooke and John Edgar Thompson, covering all of the property of said Railroad Company, including the land grant, was duly executed under authority conferred by said Joint Resolution of May 31, 1870; that the First Mortgage Missouri Division, to Farmers' Loan & Trust Company, Trustee, dated May 1, 1879; the First Mortgage Pend d'Oreille Division to Farmers' Loan & Trust Company, Trustee, dated September 1, 1879; the General First Mortgage to Central Trust Company, Trustee, dated January 1, 1881; the General Second Mortgage to Farmers' Loan & Trust Company, Trustee, dated November 20, 1883; the General Third Mortgage to Farmers' Loan & Trust Company, Trustee, dated December 1, 1887; the Consolidated Mortgage to Farmers' Loan & Trust Company, Trustee, dated December 2, 1889, were duly executed pursuant to authority conferred by said Joint Resolution of May 31,
1131 1870, and were valid; and the foreclosure of said General Second Mortgage, said General Third Mortgage, and said Consolidated Mortgage in that certain consolidated cause entitled Farmers' Loan & Trust Company et al. v. Northern Pacific Railroad Company, in the Circuit Court of the United States for the Eastern District of Wisconsin, by decrees dated April 27 and April 28, 1896, and by certain ancillary decrees duly entered in the Circuit Court of the United States in similar causes between the same parties as follows:

District of Minnesota, April 29, 1896;
District of Montana, May 1, 1896;
District of North Dakota, May 2, 1896;

District of Washington, May, 2, 1896;
Western District of Wisconsin, May 1 and May 4, 1896;
District of Idaho, May 4, 1896;
District of Oregon, May 4, 1896;
Northern District of Illinois, May 12, 1896;
Southern District of New York, May 12, 1896;
the sales of said granted lands and rights to lands; and the decrees confirming sales of said property in the several states, to the Railway Company, pursuant to said decrees of April 27 and April 28, 1896, as follows:
Eastern District of Wisconsin, July 27 and August 8, 1896;
Western District of Wisconsin, July 27 and August 17, 1896;
District of Idaho, August 3, 1896;
Northern District of Illinois, July 28, 1896;
District of Minnesota, July 27, 1896;
District of Montana, July 28 and August 1, 1896;
Southern District of New York, July 30, 1896;
District of North Dakota, July 29, 1896;
District of Oregon, August 4, 1896;
District of Washington, August 3, 1896;
were valid and in accordance with the requirements of said Joint Resolution with respect to the disposition of said granted lands, and the decree of said Circuit Court for the Eastern District of Wisconsin in said cause, dated April 27, 1899, as amended
1132 May 25, 1899, directing the public sales of all remaining lands in Minnesota and North Dakota east of the Missouri River and rights to lands and all other remaining assets; the sales of said remaining lands, rights to land, and assets, to Northern Pacific Railway Company, and the decree of confirmation of said sale, entered by said court, dated September 16, 1899, were valid and in accordance with the requirements of said Joint Resolution; that by said foreclosure proceedings and said decrees confirming said sales and by sundry deeds of conveyance for further assurance of title from Northern Pacific Railroad Company to Northern Pacific Railway Company, from Alfred L. Carey, Special Master, to Northern Pacific Railway Company, from the receivers of said Northern Pacific Railroad Company to Northern Pacific Railway Company, and from the trustees under said mortgages to Northern Pacific Railway Company, said Railway Company became and is the successor in interest to Northern Pacific Railroad Company and the owner of all land-grant lands of said Railroad Company, the right to receive additional lands and all other rights pertaining to said Railroad Company under said Act of July 2, 1864, and Joint Resolution of May 31, 1870, including the right to receive unpatented lands

and just compensation for withdrawn lands, and all other rights as provided by the Act of Congress of June 25, 1929.

1133

IV

That the aggregate of the odd-numbered sections in the place limits of the grant of July 2, 1864, after making all proper deductions, is 40,613,009.34 acres, and in the place limits of the grant of May 31, 1870, after making all proper deductions, is 2,189,857.71 acres.

V

That the United States had, prior to passage of the Joint Resolution of June 5, 1924, in compliance with said Act of July 2, 1864, duly conveyed to Northern Pacific Railroad Company and Northern Pacific Railway Company 36,350,279.74 acres; that Northern Pacific Railway Company as successor in interest to said Northern Pacific Railroad Company, had received scrip for 1,029,874.16 acres relinquished under relief and exchange acts; that Northern Pacific Railroad Company and Northern Pacific Railway Company received 503,751.43 acres by court decrees in various cases. Pursuant to the grant by the Joint Resolution of May 31, 1870, the United States had, prior to the passage of said Joint Resolution of June 5, 1924, duly conveyed to said Northern Pacific Railroad Company and Northern Pacific Railway Company 1,540,505.69 acres, and Northern Pacific Railway Company had received scrip for 48,796.95 acres for lands relinquished under relief and exchange acts; that Northern Pacific Railway Company received 161.11 acres by court decrees in various cases; that Northern Pacific Railway Company is entitled to receive patents for 428,986.68 acres under said Act of July 2, 1864, and said Joint Resolution of May 31, 1870; that

1134 said Northern Pacific Railway Company is entitled to receive just compensation, pursuant to the Act of June 25, 1929, under said Act of July 2, 1864, for 1,297,333.18 acres of land withdrawn for and placed in national forests or other government reservations; and under said Joint Resolution of May 31, 1870, for 155,727.84 acres of lands withdrawn and placed in national forests or other government reservations; that 1,447,450.27 acres were lost for some one or other of the reasons specified in said Act of July 2, 1864, and Joint Resolution of May 31, 1870, and the United States is under no obligation to said Northern Pacific Railway Company with respect thereto; that upon delivery of patents for said 428,986.68 acres and payment of just compensation for said 1,453,061.02 acres as provided

for in said Act of June 25, 1929, the United States will have fully complied with the terms and conditions of said Act of July 2, 1864, and said Joint Resolution of May 31, 1870, as supplemented by Act of June 25, 1929.

1135 VI

That the United State do through its proper officers forthwith execute and deliver to defendant Northern Pacific Railway Company patents for 412,106.58 acres of surveyed lands described in Schedule A hereto attached and made a part hereof, consisting of 28 pages, upon payment by Northern Pacific Railway Company of the usual patent and survey fees in a reasonable amount fixed by the proper officers of the United States, after crediting thereon any amount heretofore paid by Northern Pacific Railway Company therefor; that defendant Northern Pacific Railway Company pay to the United States the reasonable cost of survey and patent fees for 16,880.10 acres of unsurveyed lands described in said Schedule A, after crediting thereon the amount, if any, heretofore paid, and thereupon that the United States through its proper officers forthwith make survey of said lands and execute and deliver to Northern Pacific Railway Company patents therefor; that title of defendant Northern Pacific Railway Company to each and all of said lands be quieted and freed from any and all claims of the United States or those claiming, by, through, or under it.

Nothing in this decree shall be construed to deprive the Department of the Interior of its power and jurisdiction to adjudicate any and all claims arising under the public land laws where the claimants are not seeking title through the grants to the Northern Pacific Railroad Company or its successors or any acts in modification thereof or supplemental thereto, where such claims are pending in such Department at the time a decree herein becomes final.

1136 VII

That defendant Northern Pacific Railway Company shall receive compensation for 1,103,424.19 acres withdrawn from first indemnity limits of the grant of July 2, 1864, described in Schedule B, hereto attached and made a part hereof, provided that for 13,052.56 acres described and identified in said Schedule B compensation shall be for the value of the surface only; that defendant Northern Pacific Railway Company shall receive compensation for 180.25 acres withdrawn from mineral indemnity

limits of the grant of July 2, 1864 in Wisconsin and Minnesota, described in Schedule C hereto attached and made a part hereof; that defendant Northern Pacific Railway Company, shall receive compensation for 193,728.74 acres withdrawn from second indemnity limits of the grant of July 2, 1864, described in Schedule D hereto attached and made a part hereof, provided that for 7,580.23 acres described and identified in said Schedule D compensation shall be for the value of the surface only; that defendant Northern Pacific Railway Company shall receive compensation for 155,727.84 acres withdrawn from first indemnity limits of the grant of May 31, 1870, described in Schedule E hereto attached and made a part hereof; that said compensation shall be ascertained and paid in the manner prescribed by the Act of Congress of June 25, 1929, as supplemented by the Act of Congress of May 22, 1936, in further proceedings in this cause.

That said lands and each and every part thereof were on June 25, 1929, taken out of and removed from the operation of the land grants of July 2, 1864, and May 31, 1870, to Northern Pacific Railroad Company or its successor, Northern
1137 Pacific Railway Company, and were retained by the United States as of said date as part and parcel of the government reservations wherein the same are situated and were and are relieved from all claims of said Northern Pacific Railroad Company, or its successor, Northern Pacific Railway Company, to acquire the same by indemnity selection or otherwise in satisfaction of said land grants and each of them, and the title of the United States to said withdrawn lands and each and every part thereof, be and the same is hereby quieted as provided by said Act of June 25, 1929, as supplemented by said Act of May 22, 1936.

VIII

This decree shall be without prejudice to the contentions which either party may properly raise in the proceedings for determination by the court of the amount of compensation to which either party may be entitled.

1138 IX

That withdrawn lands in second indemnity limits of the grant of 1864, State of Montana, described in Schedule F attached hereto and made a part hereof; that withdrawn lands in second indemnity limits of the grant of 1864, State of Idaho, described in Schedule G attached hereto and made a part hereof; that withdrawn lands in the grant of 1864, State of Montana, de-

scribed in Schedule H attached hereto and made a part hereof; that lands formerly a part of the Fort Ellis Military Reservation, grant of 1864, described in Schedule I attached hereto and made a part hereof; that the lands situated in the Yakima Indian Reservation, described in Schedule J attached hereto and made a part hereof; that withdrawn lands in second indemnity limits of the grant of 1870, State of Washington, described in Schedule K, hereto attached and made a part hereof; and each and all of said lands, be retained by the United States without payment of compensation in any sum whatsoever to defendants, or either or any of them; and the claims and pretentions of defendants and each of them to any interest in said lands or otherwise in satisfaction of the deficiency in said land grants of July 2, 1864 and May 31, 1870, be and the same are hereby cancelled and removed as clouds upon the title of the United States to said lands and each and every part thereof, and the title of the United States to said lands and each and every part thereof is quieted and freed from the claims of defendants and each of them to any right, title or interest in or to any of said lands or any part thereof.

1139

X

That the patented lands situated in place limits of the grant of July 2, 1864, in North Dakota formerly within the Fort Rice Military Reservation, Fort Lincoln Military Reservation, and Great Sioux Indian Reservation; that the patented lands in Minnesota in place limits of said grant, included in a previous general route withdrawal or indemnity withdrawal for the benefit of the Lake Superior & Mississippi Railroad Company or embraced in certain uncancelled scrip at date of definite location of that part of said road opposite to said lands; that the patented lands situated in first indemnity limits of North Dakota embraced in Great Sioux Indian Reservation; that 334.88 acres of patented lands in place limits of the grant of July 2, 1864, in Montana, alleged to be within the Flathead Indian Reservation; that the patented lands in the first indemnity limits of the grant of July 2, 1864, in Washington alleged to be reserved to the Yakima Indians, all be and the same are hereby charged to the grant of July 2, 1864, and said patents are confirmed and defendant's title to said land is hereby quieted and freed from any and all claims of plaintiff and any persons claiming by, through, or under plaintiff. Said lands are described in Schedule L hereto attached and made a part hereof.

1140

XI

That the lands described in Schedule M attached hereto and made a part hereof, within place and first and second indemnity limits of the grant of July 2, 1864, and place limits of the grant of May 31, 1870, are mineral in character and were and are excepted from said grants of July 2, 1864, and May 31, 1870, and defendants have no right, title, or interest therein, and title of the United States to said lands is hereby quieted and freed from any and all claims of defendants or any of them in and to said lands or any part thereof.

XII

That the Northern Pacific Railway Company shall compensate the United States for 61,534.25 acres of place and indemnity lands involved in the Ainsworth terminal error, and for 4,295.52 acres of place and indemnity lands involved in the Portland terminal error, by crediting on the compensation payable by the United States to the Northern Pacific Railway Company, as hereinbefore provided, such amount as shall be determined by the court at the time the compensation, if any, to which defendants are entitled, is determined. Said 61,534.25 acres and 4,295.52 acres are described in Schedule N hereto attached and made a part hereof.

1141

XIII

That selections heretofore made by Northern Pacific Railway Company of approximately 4,380.47 acres of restored Crow Indian lands, except 340 acres which have heretofore been sold by said company, be canceled, and selections by Northern Pacific Railway Company of approximately 22,154.88 acres of lands in place limits in satisfaction of mineral losses, be and the same are hereby canceled, and title of the United States thereto is quieted and freed from all claims of defendants to said lands or any part thereof, except said 340 acres for which the United States shall issue and deliver patents to said Railway Company and its title thereto quieted and freed from any claims of the United States thereto or any part thereof. Said lands are described in Schedule O hereto attached and made a part thereof.

XIV

The title of the Northern Pacific Railway Company and those claiming through or under it to 63,295.02 acres within primary limits of the grant of 1864 in Montana, formerly Crow Indian

lands, heretofore patented to the Railway Company in satisfaction of mineral losses, and the title of the Northern Pacific Railway Company to 4,390.03 acres patented as mineral indemnity in place limits outside said former Crow Reservation, is hereby quieted and freed from any and all claims of the United States to said lands or any part thereof. Said lands are described in Schedule P hereto attached and made a part hereof.

1142 XV

Nothing contained in this decree shall be deemed to be an adjudication as between the defendants in this cause as to the interest or lien of the defendants Bankers Trust Company as Trustee and City Bank Farmers Trust Company as Trustee in or upon the lands which were on June 25, 1929, taken out of and removed from the operation of the land grants of July 2, 1864, and May 31, 1870, to the Northern Pacific Railroad Company or its successor, Northern Pacific Railway Company, and were retained by the United States, or as to the interest of said defendants in the proceeds or avails thereof, all of which questions are reserved until the final hearing.

IT IS FURTHER ADJUDGED AND DECREED that plaintiff and defendants pay each one half of the cost of the references to the Special Master and that neither party recover costs from the other.

J. STANLEY WEBSTER,
District Judge.

Dated June 27, 1939.
Approved as to form.
Enter.

1143 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Stipulation relating to schedules attached to decree

Filed Aug. 21, 1939

For the purpose of abbreviating the record in the above-entitled cause as contemplated by Rule 75 (e) of the Federal Rules of Civil Procedure and Rule 10 (2) of the Supreme Court, all parties hereto stipulate and agree as follows:

Certain schedules attached to the decree are entitled as follows:

Schedule A.—List of 412,016.58 acres of surveyed lands and

16,880.10 acres of unsurveyed lands to which Northern Pacific Railway Company is entitled to have patented to it in satisfaction of grants of July 2, 1864, and May 31, 1870, as provided by the Act of June 25, 1929.

Schedule B.—List of 1,103,424.19 acres in First Indemnity Limits of the Grant of July 2, 1864, to which defendant Northern Pacific Railway Company is entitled to just compensation as provided by the Act of June 25, 1929.

1144 Schedule C.—List of 180.25 acres in Mineral Indemnity Limits of the Grant of July 2, 1864, in Wisconsin and Minnesota to which defendant Northern Pacific Railway Company is entitled to just compensation as provided by the Act of June 25, 1929.

Schedule D.—List of 193,728.74 acres in Second Indemnity Limits of the Grant of July 2, 1864, to which defendant Northern Pacific Railway Company is entitled to just compensation as provided by the Act of June 25, 1929.

Schedule E.—List of 155,727.84 acres in First Indemnity Limits of the Grant of May 31, 1870, to which defendant Northern Pacific Railway Company is entitled to just compensation as provided by the Act of June 25, 1929.

Schedule F.—Schedule of Lands within the Second Indemnity Limits of the Grant of July 2, 1864, embraced within the exterior boundaries of National Forests or other Governmental Reservations on June 5, 1924, for which the Northern Pacific Railway Company or its predecessors in interest are not entitled to compensation and the United States is entitled to have its title quieted in accordance with the provisions of the Act of June 25, 1929 (46 Stat. 41). (Totaling 540,490.56 acres.) (State of Montana.)

Schedule G.—Schedule of Lands within the Second Indemnity Limits of the Grant of July 2, 1864, embraced within the exterior boundaries of National Forests or other Governmental Reservations on June 5, 1924, for which the Northern Pacific Railway Company or its predecessors in interest are not entitled to compensation and the United States is entitled to have its title quieted in accordance with the provision of the Act of June 25, 1929 (46 Stat. 41). (Totaling 227,773.54 acres.) (State of Idaho.)

Schedule H.—Schedule of Lands within the Mineral Indemnity Limits of the Grant of July 2, 1864, embraced within the exterior boundaries of National Forests or other Government Reservations on June 5, 1924, for which the Northern Pacific Railway Company or its predecessors in interest are not entitled to compensation and the United States is entitled to have its title quieted in accordance with the provision of the Act of June 25, 1929 (46 Stat. 41). (Totaling 314,544.06 acres.) State of Montana.)

1145 Schedule I.—Schedule of Lands within the Place Limits of the Grant of July 2, 1864 and a part of Fort Ellis Military Reservation, restored to entry by Act of April 13, 1891, and embraced within the exterior boundaries of National Forests or other Governmental Reservations on June 5, 1924, for which the Northern Pacific Railway Company or its predecessors in interest are not entitled to compensation and the United States is entitled to have its title quieted in accordance with the provisions of the Act of June 25, 1929 (46 Stat. 41). (Totaling 3,300.82 acres.)

Schedule J.—List of 22,913.76 acres in First Indemnity Limits of the Grant of July 2, 1864 in the State of Washington and in the Yakima Indian Reservation, to which the United States is entitled to have its title quieted without payment of compensation to defendant.

Schedule K.—List of 196,761.66 acres in Second Indemnity Limits of the Grant of May 31, 1870, to which the United States is entitled to have its title quieted without payment of compensation to defendant.

Schedule L.—List of 2,569.92 acres in Place Limits and 67,090.68 acres in First Indemnity Limits of the Grant of July 2, 1864, patented to the Northern Pacific Railroad Company or the Northern Pacific Railway Company to which the defendants title is quieted and the patents confirmed.

Schedule M.—Schedule of Lands found to be Mineral upon the concession of the Northern Pacific Railway Company before the Master in Chancery that the lands are of such character—Grant of July 2, 1864, and Grant of 1870.

Schedule N.—List of 61,534.25 acres of lands involved in the Ainsworth Terminal Error and 4,295.52 acres of Lands Involved in Portland Terminal Error, for which the Northern Pacific Railway Company will compensate the United States in such amount as the Court may determine.

1146 Schedule O.—List of 4,040.47 acres of restored Crow Indian Lands and 22,154.98 acres of lands in Place Limits of the Grants of 1864 and 1870, selected in lieu of mineral losses, which selections are cancelled and the title of the United States to said lands quieted and freed from all claims of defendants; and list of 340 acres of restored Crow Lands selected by the Northern Pacific Railway Company in lieu of mineral losses for which the Northern Pacific is entitled to have patents issued.

Schedule P.—List of 63,295.02 acres of restored Crow Indian Lands and 4,390.03 acres of lands in the Place Limits of the Grants patented to the Northern Pacific Railway Company in lieu of Mineral Losses, which title is quieted and freed from any and all claims of the United States to said lands.

It is stipulated that the schedules above referred to need not be incorporated in the record on the appeals to the Supreme Court and that this stipulation shall be incorporated therein in their stead.

Dated August 21, 1939.

Norman M. Littell, Assistant Attorney General; Walter L. Pope, E. E. Danly, Special Assistants to the Attorney General; L. B. daPonte, F. J. McKevitt, D. R. Frost, Solicitors for defendants Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company; White & Case, Solicitors for defendant Bankers Trust Company; Taylor, Blane, Capron & Marsh, Solicitors for defendant City Bank Farmers Trust Company.

1147 In United States District Court

[Title omitted]
[File endorsement omitted.]

Petition for appeal

Filed Aug. 21, 1939

To the HONORABLE J. STANLEY WEBSTER,
Judge of the District Court of the United States,
for the Eastern District of Washington.

The petition of the United States of America, the plaintiff herein, respectfully shows that on the 27th day of June, 1939, a decree was duly entered in this court in this cause upon a review of the Report of the Special Master made pursuant to an order of reference entered in said suit on April 21, 1936, and which decree adjudged that the defendant, Northern Pacific Railway Company, was entitled to compensation from the United States for or on account of certain lands therein described, that said Railway Company was entitled to patents from the United States for certain lands therein described, that the United States was entitled to compensation from the defendant Railway Company for certain lands therein described, and that the plaintiff was entitled to have its title quieted to certain lands therein
1148 described. Plaintiff further shows that in said cause an order was duly entered in this court on October 3, 1935, and amended by an order of January 29, 1936, which said order dismissed from the amended complaint certain portions and

subdivisions thereof, and sustained special defenses of the defendants with respect to portions of the bill of complaint. Plaintiff respectifully shows that in said decree and said order and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment or errors which is filed with this petition.

WHEREFORE, this plaintiff prays that an appeal may be allowed to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

NORMAN M. LITTLE,
Assistant Attorney General.
WALTER L. POPE,
E. E. DANLY,
Special Assistants to the Attorney General.

1149 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Assignment of errors

Filed Aug. 21, 1939

Comes now the United States of America, plaintiff in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause, from the order of this court entered herein on October 3, 1935, as amended by the order of January 29, 1936, and also from the decree of this court entered herein on the 27th day of June 1939.

The District Court erred:

1. In holding that Subdivision VII of the amended complaint alleging facts relating to the issuance by the Northern Pacific Railroad Company of 6,000 shares of its capital stock for less than the par value thereof, is insufficient in point of
1150 law upon the face thereof, and in dismissing it from the complaint.

2. In holding that Subdivision VIII of the amended complaint, alleging facts relating to the issuance of the capital stock of the Northern Pacific Railroad Company without consideration and for less than the par value thereof, and without offering the same

to the public, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint.

3. In holding that Subdivision IX of the amended complaint, alleging facts relating to the reorganization of the Northern Pacific Railroad Company in 1875, the issuance of its corporate stock without consideration and for less than the par value thereof, and the sale, under foreclosure decree, to a bondholders' committee, of certain granted lands without public sale in the State where the same were situated, is insufficient in point of law upon the face thereof; and in dismissing all of that Subdivision except the first two paragraphs thereof from the complaint.

4. In holding that the plaintiff is barred by acquiescence and waiver, from asserting the matter set forth in Subdivision IX of the amended complaint.

5. In holding that Subdivision XII of the amended complaint, alleging facts relating to the exchange of granted lands for preferred stock of the Northern Pacific Railroad Company, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint.

6. In holding that the plaintiff is barred by acquiescence and waiver from asserting the matter set forth in Subdivision XII of the amended complaint.

1151 7. In holding that Subdivision XIII of the amended complaint, alleging facts relating to the failure of the defendants to comply with the proviso of the Joint Resolution of May 31, 1870, 16 Stat. 378, requiring that certain lands shall be subject to settlement and preemption at a price not exceeding $2.50 per acre, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint.

8. In holding that the plaintiff is barred by acquiescence and waiver from questioning the validity of mortgages executed after the year 1875.

9. In holding that Subdivision XIV of the amended complaint, alleging facts relating to an alleged dissipation by the Railroad of funds received from the land grant in the construction of branch lines and consequent breach by it of the contract to build from Wallula to Portland, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint.

10. In holding that Subdivision XVIII of the amended complaint, alleging facts relating to the sale of lands within the grant, on foreclosure, pursuant to a reorganization plan of 1896, to the Northern Pacific Railway Company, rather than to third persons as required by the Joint Resolution of May 31, 1870, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint.

11. In holding that the plaintiff is estopped from setting up or relying on the facts set forth in Subdivision XVIII of the amended complaint.

12. In holding that Subdivision XIX of the amended complaint, alleging facts relating to the cost of construction
1152 of the main line of the Northern Pacific Railroad Company as compared to the amounts of money and the value of other assets received by the Northern Pacific companies from the granted lands, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint.

13. In holding that Subdivision XXVI of the amended complaint, alleging failure of the Northern Pacific Railroad Company to construct a line from Wallula to Portland and facts relating to the construction by it through the territory of Washington of a line of road which was unnecessarily circuitous in route, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint.

14. In holding that the plaintiff is estopped, or barred by acquiescence or waiver, from alleging or relying upon the facts set forth in Subdivision XXVI relating to the circuitous route of the railroad.

15. In holding that Subdivision XXVIII of the amended complaint, alleging facts relating to the mineral classification of lands under the Act of February 26, 1895, 28 Stat. 683, (to the effect that said classification was void and not in compliance with the terms of the grant by reason of the fraudulent and improper conduct of the mineral commissioners, induced by the fraud and overreaching of the Railroad, and that its conduct in that regard constituted a breach of the terms and conditions of the grant), is insufficient in point of law upon the face thereof, and in dismissing it from the complaint.

16. In holding that in the absence of demand for reclassification of lands or for recovery of lands or damages after reclassification, no consideration may be given in this
1153 suit to the fraud and other misconduct alleged in Subdivision XXVIII in respect to the mineral classification and that no remedy or relief is available on account thereof.

17. In holding that Subdivision XXIX of the amended complaint, alleging facts relating to the Fort Laramie Treaty with certain Indians, dated September 17, 1851, and the Blackfoot Treaty of October 17, 1855, 11 Stat. 657, whereby certain lands were set apart and reserved for Indians, and the erroneous administration of the grant without regard to such treaties, with the consequent receipt by the defendants of lands in excess of the quantity to which they were entitled, is insufficient in point

of law upon the face thereof, and in dismissing it from the complaint.

18. In holding that the plaintiff is estopped from alleging or relying upon the facts set forth in Subdivision XXIX of the amended complaint.

19. In holding that Subdivision XXXII of the amended complaint, alleging facts relating to the erroneous administration of the grant through withdrawal of lands upon the filing of general route maps, and through withdrawal of lands in indemnity limits, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint.

20. In holding that Subdivision XXXV alleging facts relating to the improper acquisition by the Railroad of valuable lands in lieu of less valuable land in the Mt. Rainier Forest Reserve, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint.

21. In holding that the plaintiff is without power or right of forfeiture, and that the forfeiture declared by
1154 section 2 of the Act of June 25, 1929, 46 Stat. 41, is void and that the United States is without power or right to declare it.

22. In holding that the plaintiff is barred by acquiescence and waiver from asserting or claiming the forfeiture declared by section 2 of the Act of June 25, 1929, 49 Stat. 41, and alleged in Subdivision XXXVIII of the amended bill of complaint, and in dismissing it from the complaint.

23. In failing to hold that by reason of the Railroad Company's failure to locate or construct its line between Wallula, Washington, and Portland, Oregon, the United States had the right to refuse to convey further indemnity lands at the time the several withdrawals were made, and that therefore such withdrawals were and are valid.

24. In failing to hold that if, as alleged in various subdivisions of the amended complaint which were dismissed by the court therefrom, the Railroad was guilty of breaches of contract, acts of fraud and illegal conduct therein alleged, the Government had the right to refuse to convey further indemnity lands at the time the several withdrawals were made, and that therefore such withdrawals were and are valid.

25. In failing to hold that if, as alleged in various subdivisions of the amended complaint which were dismissed by the court therefrom, the Railroad was guilty of breaches of contract, acts of fraud and illegal conduct therein alleged, the Government had the right to refuse further performance when the Act of June 25, 1929, was passed and therefore the Government is under no obligation to compensate for lands withdrawn.

1155 26. In failing to hold that if, as alleged in various subdivisions of the amended complaint which were dismissed by the court therefrom, the Railroad was guilty of breaches of contract, acts of fraud and illegal conduct therein alleged, the Government is under no obligation to convey any lands which are in the indemnity belts and outside the withdrawals.

27. In holding withdrawals invalid and the Railway Company entitled to compensation on account of withdrawn lands without determining the facts alleged in Subdivision XXVIII and other subdivisions of the amended complaint which were dismissed by the court and which set forth facts showing that the Railroad has received large amounts in lands, or values, through fraud, breach of contract, and errors in the administration of the grants, and thus tender issues which the court was required by the Act of June 25, 1929, to determine.

28. In holding that the Railroad may assign the mineral base listed in its exhibit C to lands received by it on invalid Portage base without a determination as to whether such mineral base, most of which resulted from the classification made under the Act of February 26, 1895, was invalid by reason of the fraud and breaches of contract in respect to such classification alleged in Subdivision XXVIII, which was erroneously dismissed by the court from the complaint.

29. In failing to add to the court's finding (b) in Subdivision I entitled "General Findings and Conclusions," a statement and finding of fact that the time limited in the Act of July 2, 1864, as amended, for the completion of said railroad, was July
1156 4, 1879; that on that date 530.4 miles of the contemplated road had been constructed; and that thereafter 1,507.31 miles of road were constructed; but the main line of the railroad between Wallula, Washington, and Portland, Oregon, via the Valley of the Columbia River, a distance of approximately 225 miles, was never definitely located or constructed.

30. In finding that the sales of mortgaged land following the decrees of foreclosure in 1896 and subsequent thereto were in single sections or subdivisions thereof to the highest and best bidder in accordance with the requirements of the Joint Resolution of May 31, 1870.

31. In holding that the mortgages thus foreclosed were duly executed under authority conferred by the Joint Resolution of May 31, 1870.

32. In holding that, in determining the validity of withdrawals in indemnity limits, land unsurveyed at date of withdrawal cannot be counted.

33. In finding those withdrawals invalid which when made left sufficient vacant lands including surveyed and unsurveyed land to satisfy proper losses of the Railroad.

34. In holding that, in determining the validity of withdrawals in indemnity limits, lands classified as mineral after the date of withdrawal cannot be counted.

35. In holding that the Railroad is entitled to use prior nonmineral losses as well as subsequent losses as base for selecting lands in second indemnity limits.

36. In holding that a withdrawal remained invalid although at some time subsequent to the withdrawal there were more than sufficient surveyed nonmineral lands in the indemnity belt to satisfy all proper losses.

1157 37. In failing to hold that the withdrawal of March 1, 1898, of 163,280 acres in the second indemnity belt in Idaho, is a valid withdrawal, except as to the difference between the amount of unused losses then properly satisfiable in that belt (30,879.76 acres) and the amount of surveyed land available for indemnity within that belt (25,500.72 acres), or as to 5,379.04 acres.

38. In holding that the withdrawal set forth in assignment 37 was and remained invalid although by December 31, 1900, there were 47,513.59 acres of vacant surveyed lands in the second indemnity limits and the Railroad had only 29,857.23 acres of unused losses satisfiable in that belt, and on December 31, 1905, there were still 44,073.15 acres of vacant surveyed lands and the Railroad's unused losses satisfiable in that belt were 29,576.25 acres.

39. In failing to hold that withdrawals which left insufficient lands to satisfy all the losses were invalid only to the extent of the deficiency.

40. In holding the several withdrawals invalid notwithstanding the failure to prove or establish whether a deficiency would have existed at the dates of the withdrawals had the Wallula-Portland line been located or constructed.

41. In refusing to hold that losses within the Crow Reservation as defined by the Treaty of May 7, 1868, were prior and not subsequent losses, and that therefore the Railroad may not claim compensation for or on account of any withdrawn lands in second indemnity limits in Montana.

42. In holding that the Railroad is entitled to compensation for all of the withdrawn lands to which it can now assign losses in the absence of proof as to whether the Railroad

1158 would have received all of them or any of them, or that it has received any less lands than it would have received if the withdrawals had not been made.

43. In holding that the Railroad is entitled to compensation for all of the withdrawn lands to which it can now assign losses, in the absence of proof that the Railroad would have received all of said lands had such withdrawals not been made, or that any amount of such lands would in that event have been received, or that through such withdrawals the Railroad lost lands which exceeded in value or amount the lands which it improperly received through the illegal withdrawals mentioned in Subdivision XXXII of the amended complaint, and through the other errors in the administration of the grants alleged in those portions of the amended complaint which the court dismissed therefrom.

44. In holding that the Joint Resolution of May 31, 1870, authorized the laying down of second indemnity belts opposite the line of railroad constructed from Portland to Puget Sound, in the event of a deficiency on final location.

45. In approving and adopting from the Master's findings of fact and conclusions of law the conclusions relating to "agricultural lands", and holding that the phrase "agricultural lands", as used in section 3 of the Act of July 2, 1864, is intended to be used in opposition to the phrase "mineral lands", and to include all lands not mineral, and not iron, and not coal.

46. In holding that the lands described in Northern Pacific exhibits 144, 145, and 146 are all agricultural lands.

47. In approving and adopting from the Master's findings of fact and conclusions of law those findings and conclu-
1159 sions relating to "Northern Cheyenne Indian Reservation lands", which hold that the Northern Cheyenne Indian Reservation is a government reservation within the meaning of section 1 of the Act of June 25, 1929, and that the lands therein are governed by the same rules as apply to lands within national forests and other government reservations.

48. In approving and adopting from the Master's findings of fact and conclusions of law, those findings and conclusions relating to "Northern Cheyenne Indian Reservation lands" which hold that the lands, when reserved, were unoccupied and unappropriated public lands.

49. In holding that the Railroad is entitled to compensation for the 2,480.91 acres of land patented to homesteaders after withdrawal, referred to in Subdivision XII of the court's findings.

50. In holding that the Railroad is entitled to patent for the tracts of land described in Subdivision XIV of the court's findings.

51. In overruling the plaintiff's objections to the court's proposed findings and conclusions, the ruling as to each objection constituting a separate error.

52. In holding that the Railroad is now entitled to receive patent to any of the indemnity lands mentioned or referred to in Subdivision XVIII of the court's findings.

53. In holding any withdrawals by the Government in the indemnity limits invalid.

54. In holding that the Railroad is entitled to compensation for or on account of any indemnity lands involved in the suit.

1160 55. In failing to hold that the facts admitted and alleged in the amended and supplemental answer of the Northern Pacific Railway Company require the court to hold that the several withdrawals are valid.

Dated August 21, 1939.

NORMAN M. LITTELL,
Assistant Attorney General.

WALTER M. POPE,
E. E. DANLY,
Special Assistants to the Attorney General.

1171 In United States District Court

[Title omitted.]

[File endorsement omitted.]

Order allowing appeal

Filed Aug. 21, 1939

The petition of the United States of America, plaintiff in the above-entitled cause, for an appeal to the Supreme Court of the United States from the decree of this court entered June 27, 1939, upon a review of the Report of the Special Master, made pursuant to an order of reference entered in said suit on April 21, 1936, and also from the order of this court entered in said cause on October 3, 1935, as amended by an order of January 29, 1936, is hereby granted, and the appeal is allowed, and said appeal shall suspend and stay all proceedings in this court until the determination of said appeal by the Supreme Court of the United States.

Dated August 21, 1939.

J. STANLEY WEBSTER,
District Judge.

1172 [Citation in usual form showing service on L. B. da Ponte et al., filed Aug. 21, 1939, omitted in printing.]

1176 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Petition for appeal

Filed Aug. 21, 1939

To the Honorable J. STANLEY WEBSTER, *Judge of the District Court of the United States for the Eastern District of Washington:*

Your petitioners, Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company, Bankers Trust Company, and City Bank Farmers Trust Company, respectfully show:

On the 27th day of June 1939, the decree in this cause was entered upon the review of the report of the Master filed July 26, 1937, and made pursuant to the order of this Court entered April 21, 1936. The said decree is greatly to the prejudice and injury of your petitioners and is erroneous and inequitable.

1177 The errors upon which your petitioners claim to be entitled to an appeal are more fully set out in the assignment of errors and prayer for reversal, filed with the Clerk pursuant to Rule 9 of the Rules of the United States Supreme Court, and there has been likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rule 12 of the Rules of said Court.

Wherefore, in order that your petitioners may obtain relief in the premises, and have opportunity to show the errors complained of, your petitioners pray for the allowance of an appeal in this cause to the Supreme Court of the United States, agreeable to the statutes and rules of said Court in such cases made and provided, and that a proper order touching the security required of the petitioners may be made.

Dated August 21, 1939.

L. B. DA PONTE,
F. J. MCKEVITT,
D. R. FROST,

Attorneys for Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company.

White & Case,
Attorneys for Bankers Trust Company.

1178 TAYLOR, BLANC, CAPRON & MARSH,
Attorneys for City Bank Farmers Trust Company, Petitioners.

1179 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Assignment of errors

Filed Aug. 21, 1939

Defendants, Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company, Bankers Trust Company, and City Bank Farmers Trust Company, in connection with their petition for an appeal to the Supreme Court of the United States, say that the decree entered in the above cause on the 27th day of June 1939 is erroneous, and assign the following errors in the proceedings in this cause:

I

The District Court for the Eastern District of Washington, Northern Division, erred in adjudging by paragraph IX of the decree that the withdrawals of 213,001.66 acres from
1180 second indemnity limits of the grant of May 31, 1870, in the state of Washington (except 16,240 acres claimed as being also within the first indemnity limits of the grant of July 2, 1864), described in Schedule K attached to the decree, were valid and that said lands should be retained by the United States without payment of compensation to defendants or any of them. (R. —).

II

The District Court erred in concluding that the Northern Pacific Railroad Company and its successor, Northern Pacific Railway Company, were not entitled to indemnity under the grant of 1870 for the loss of 637,580.99 acres of odd-numbered sections within the place limits of the grant of July 2, 1864, and earned and received by said Northern Pacific Railroad Company under the Act of July 2, 1864. Conclusion (b) of Finding III, R. —.

III

The District Court erred in holding in Conclusion (b) to Finding III, R. —, that the grant by the Joint Resolution of May 31, 1870, in Washington was not deficient on September 22, 1882, the date of final location of the line authorized by said Joint Resolution; that second indemnity limits in Washington, there-

fore, were not authorized; and that the withdrawals of 213,001.66 acres from said second indemnity limits of Washington (except 16,24) acres claimed as being also within the first indemnity limits of the grant of July 2, 1864) were and are valid.

1181 IV

The District Court erred in overruling defendants' Exception II to the report of the Special Master filed with the Clerk July 26, 1937, wherein the defendants excepted in detail to said Master's report, finding, and conclusion that said withdrawals of 213,001.66 acres were valid and said lands should be retained by the United States without payment of compensation; that said Railway Company was not entitled to indemnity for the loss of said Overlap lands; that the grant of May 31, 1870 was not deficient September 22, 1882, date of final location of the line authorized thereby; that second indemnity limits in Washington was not authorized; that the withdrawals of said 213,000.66 acres were and are valid, Exception II, R.—; Order on Exceptions, paragraph (23), R.—.

Wherefore, these defendants pray that the said decree entered as aforesaid be reversed and that a proper decree be rendered herein.

L. B. DAPONTE,
D. R. FROST,
F. J. MCKEVITT,
Attorneys for Defendants, Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company.

WHITE & CASE,
Attorneys for Defendant, Bankers Trust Company.

TAYLOR, BLANC, CAPRON & MARSH,
Attorneys for Defendant, City Bank Farmers Trust Company.

1185 In United States District Court

[Title ommitted.]
[File endorsements omitted.]

Order allowing appeal

Filed Aug. 21, 1939

The petition of Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company,

Bankers Trust Company, and City Bank Farmers Trust Company, defendants in the above entitled cause, for an appeal to the Supreme Court of the United States from the decree of this Court entered on the 27th day of June 1939, upon the review of the report of the Master filed July 26, 1937, having been filed herein, accompanied by an assignment of errors and statement as to jurisdiction, all as provided by Rules 9 and 12 of the Rules of the United States Supreme Court, and the said papers
1186 having been presented to this Court and the record in this cause having been considered;

It is hereby ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from said decree entered on the 27th day of June 1939, in this cause, and that the Clerk of this Court shall within sixty days from this date make and transmit to the Supreme Court of the United States under his hand and the seal of the Court a true copy of the material parts of the record herein which shall be designated by a praecipe or a stipulation of the parties, or their counsel herein, all in accordance with Rule 10 of the Rules of said Supreme Court.

It is further ordered that the said appellants shall give a good and sufficient cost bond in the sum of Five Hundred Dollars ($500.00) conditioned as required by law.

Done by the Court this 21st day of August 1939.

J. STANLEY WEBSTER,
District Judge.

1187 [Bond on appeal for $500.00 approved and filed Aug. 21, 1939, omitted in printing.]

1193 [Citation in usual form showing service on Norman M. Littell, et al., filed Aug. 21, 1939, omitted in printing.]

1199 In United States District Court, for the Eastern District of Washington, Northern Division

Equity No. 4389

UNITED STATES OF AMERICA

v.

NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Narrative statement of evidence

Filed Aug. 21, 1939

Be it remembered that the above-entitled cause came on regularly for hearing before the Special Master, the Honorable Frank

H. Graves, on the 20th day of April, 1932, at Washington, D. C., upon the issues submitted for his determination by the order of reference made by the court on the 25th day of February, 1932.

Appearances:

D. F. McGowan and E. E. Danly, Special Assistants to the Attorney General, for the United States.

D. F. Lyons and D. R. Frost for the Northern Pacific Railway Company and the Northwestern Improvement Company.

Taylor, Blane, Capron & Marsh by George S. Mittendorf for the City Bank Farmers Trust Company.

White & Case by Alfred N. Houston for the Bankers Trust Company.

Guy V. Collins was called as a witness on behalf of the defendant Northern Pacific Railway Company, and having been first duly sworn, testified as follows (1):

DIRECT EXAMINATION

I live at 1812 Irving Street, N. E., Washington, D. C. I
1200 am Chief Clerk of the Washington Evening Star. I have brought the files of the newspaper for the period of March and April, 1908, and I have the edition of the Washington Evening Star for March 11, 1908. There is an article entitled "At the White House" on page 2 of that issue (1-2).

By Mr. Lyons: I offer in evidence this article from the Washington Star, and I will state that the purpose of the offer is this: There is an attack in the Government's bill on the mineral classification. One of the defenses of that attack is laches and equitable estoppel; that the Government knew all about the facts; that every branch of the Government knew it; that these charges that were made were matters of general notoriety, but that the Government brought no action, and that it is now equitably estopped, the defendants having changed their position, and it is barred by its laches.

By Mr. McGowan: We will object to it on the ground that it is incompetent, irrelevant, and immaterial, for the reason that newspaper articles cannot be offered in this manner, and for the additional reason that laches does not run against the Federal Government where the construction of an Act involving a public policy is concerned. We don't want to take up too much time but we do want to save the objection on the ground that a matter of this sort cannot be proved by a newspaper article, which is the rankest kind of hearsay.

By the Master: The Master is at present of the opinion that the objection is well taken but will reserve the right to change his mind; in the meantime, however, he will admit it, subject to your objection (3–4).

1201 *Northern Pacific Exhibit 1*

EXTRACT FROM WASHINGTON EVENING STAR, MARCH 11, 1908

WANT LAND GRANTS INVESTIGATED

President Roosevelt was today asked to have an investigation made as to whether the Northern Pacific railroad does not own millions of acres of land between Puget Sound and Lake Superior which it has no right to. If he finds this is true he is requested to ask Congress for authority to have the lands returned to the Government. The case arises over the grant made to the Northern Pacific of eighty miles of government lands on each side of its tracks between the two points named. Under the law, however, this grant did not cover mineral lands, all of which were reserved to the government.

For a long time there was dispute as to whether certain lands supposed to be conveyed to the Northern Pacific contained minerals, and in 1895 Congress provided a commission to segregate the mineral from the other land. It is now alleged that this commission was so exceptionally liberal that it classified millions of acres of lands as containing no minerals that should properly belong to the government. It is further claimed that 1,600,000 acres were never classified at all. The President told the delegation that called upon him—a number of Montana men, introduced by Senator Dixon—that he would give the matter careful and prompt consideration.

G. H. Plummer was called as witness on behalf of the defendants (30):

DIRECT EXAMINATION

My residence is Seattle, Washington. I am Western Land Agent of the Northern Pacific Railway Company and have been in the company's employ since 1895. From 1901 I have been in charge of the Western District of the Northern Pacific Railway Company covering administration, sales, and leases of lands of that company in Washington, Idaho, and Oregon. I did not attend the sale conducted by Special Master Alfred L. Cary on August 3, 1896. I have in my custody the files and records of the land sales made by the company in the State of Washington.

My file contains the contract of sale dated May 20, 1897, of W½, Sec. 33, T. 24 N., R. 6 E., which is the tract upon which Fred Rice Rowell bid according to Beriah Broun's testimony.

1202 NORTHERN PACIFIC EXHIBIT 15

(This exhibit, received in evidence, is a copy of the contract dated May 20, 1897, between Northern Pacific Railway Company, as vendor, and Charles D. Ross, as purchaser, and providing for the sale of the NW¼, Sec. 33, T. 24 N., R. 6 E., for the consideration of $25,000.00.)

By the witness: The file contains a letter from John H. Bryant, Receiver of the Seattle Coal and Iron Company, dated May 12, 1896, addressed to Thomas Cooper, Western Land Agent of the Company, making an offer for this tract of land prior to the sale of the Northern Pacific lands by the Special Master on August 3, 1896, at Seattle (31–33).

NORTHERN PACIFIC EXHIBIT 16

(This exhibit, received in evidence, is a copy of a letter from John H. Bryant, Receiver of the Seattle Coal and Iron Company, to Thomas Cooper, Western Land Agent, Tacoma, Washington, dated May 12, 1896, replying to Cooper's letter of March 31 relating to the sale of NW¼, Sec. 33, T. 24 N., R. 6 E., and stating that he will recommend to the Seattle Coal and Iron Company that it purchase this land at $100 per acre.)

NORTHERN PACIFIC EXHIBIT 17

(This exhibit, received in evidence, is copy of a letter from Thomas Cooper, Western Land Agent, dated May 13, 1896, addressed to J. H. Bryant, and referring to Bryant's letter of May 12, 1896. It states that the terms quoted in Mr. Cooper's letter of March 31 were as favorable as could be made, and further stated: "As you are aware, it is against the policy of this Company to sell its coal lands and a special exception was made in this case with a great deal of reluctance.")

1203 NORTHERN PACIFIC EXHIBIT 18

(This exhibit, received in evidence, is a copy of a letter from Thomas Cooper, adressed to J. H. Bryant, dated March 31, 1896, stating that he is authorized to offer for sale NW¼, Sec. 33, T. 24 N., R. 6 E., for $125 an acre.)

By the witness: $5,000 was added to the purchase price because of trespass by the Coal Company on that piece of land. My file shows that on May 20, 1897, $25,000 was paid in cash as the purchase price of the NW¼, Sec. 33, T. 24 N., R. 6 E. That purchase price was paid by Charles D. Ross (35-36).

The following exhibits were offered and received in evidence:

NORTHERN PACIFIC EXHIBITS 19, 19 A AND 19–B

(Northern Pacific Exhibit 19 was received in evidence over the objection of plaintiff that it was incompetent, irrelevant and immaterial, and that res judicata is not a defense in this suit. Said Exhibit 19 is a certified copy of the transcript of record in the Supreme Court of the United States, October Term, 1899, Case No. 408, entitled "The United States, Appelant, vs. Northern Pacific Railroad Company et al.," referred to as the "Eastern Terminus Case," 177 U. S. 435. The material facts shown by said Exhibit 19 are set forth in the amended and supplemental answer of defendant Railway Company beginning with line 28 on page 10 and ending with line 31 on page 11 thereof, and to avoid repetition are not stated here.

Northern Pacific Exhibits 19–A and 19–B, received in evidence over the objection of plaintiff are, respectively, the decree and mandate of the Supreme Court in the Eastern Terminus case. Said decree affirmed the decree of the lower court that dismissed the bill of complaint.)

1204 NORTHERN PACIFIC EXHIBITS 20, 20–A AND 20–B

(Northern Pacific Exhibit 20, received in evidence over the same objection of plaintiff as made to Exhibit 19, is a certified copy of the transcript of record in the Supreme Court of the United States, October Term, 1903, Case No. 145, entitled "United States, Petitioner, vs. Northern Pacific Railroad Company and Northern Pacific Railway Company." Said case is referred to as the "Portland Overlap Case", 193 U. S. 91. The material facts shown by said Exhibit 20 are set forth in the amended and supplemental answer of said Railway Company beginning with line 32, page 11, and ending with line 25, page 13, of said answer.

Northern Pacific Exhibits 20–A and 20–B received in evidence over objection of plaintiff are, respectively, the decree and mandate of the Supreme Court in the Portland Overlap Case.)

NORTHERN PACIFIC EXHIBITS 21, 21–A AND 21–B

(Northern Pacific Exhibit 21, received in evidence over the same objection of plaintiff as made to Exhibit 19, is a transcript

of the record in the Supreme Court of the United States, October Term, 1912, Case No. 500, entitled "Northern Pacific Railway Company, The Mercantile Trust Company, et al, Appellants, vs. United States of America." The case is referred to as "Yakima Indian Reservation Case", 227 U. S. 355. The material facts shown by said Exhibit 21 are as pleaded in the amended and supplemental answer of said Railway Company in this suit, beginning with line 26 on page 13 and ending with line 28 on page 14, of said answer.

Northern Pacific Exhibits 21–A and 21–B, received in evidence over the objection of the plaintiff, are, respectively,
1205 the decree and mandate of the Supreme Court in the Yakima Indian Reservation Case.)

NORTHERN PACIFIC EXHIBITS 22, 22–A, AND 22–B

(Northern Pacific Exhibit 22, received in evidence over the same objection of plaintiff as made to Exhibit 19, is a certified copy of the transcript of record in the Supreme Court of the United States, October Term, 1920, Case No. 325, entitled "United States of America, Appellant, vs. Northern Pacific Railway Company." The case is referred to as the "Forest Reserve Case," 256 U. S. 51. The material facts shown by Exhibit 22 are as stated in the amended and supplemental answer of Northern Pacific Railway Company, beginning with line 29, page 14, and ending with line 30, page 15.

Northern Pacific Exhibits 22–A and 22–B, received in evidence over objections of plaintiff, are, respectively, the decree and mandate of the Supreme Court in the "Forest Reserve Case.")

NORTHERN PACIFIC EXHIBITS 23 AND 24

(Northern Pacific Exhibit 23, received in evidence over the same objection of plaintiff as made to Exhibit No. 19, is an exemplified copy of the bill of complaint, answer, decision on final hearing, and order of dismissal in cause No. 1027, entitled "United States of America v. Northern Pacific Railway Company, et al." in the United States Circuit Court, District of Washington, Western Division.

Northern Pacific Exhibit 24, received in evidence over the same objection of plaintiff as made to Exhibit 19, is an exemplified copy of the bills of complaint, answers, and orders of dismissal in the companion cases to cause No. 1027 (Northern
1206 Pacific Exhibit No. 23). The material facts shown by said Northern Pacific Exhibits Nos. 23 and 24 are set forth in amended and supplemental answer of defendant Rail-

way Company, beginning with line 15 on page 40, and ending with line 29 on page 41 thereof, and to avoid repetition are not stated here.)

NORTHERN PACIFIC EXHIBITS 25, 25-A, 25-B, 26, 26-A, AND 26-B

(Northern Pacific Exhibit 25, received in evidence over the same objection of plaintiff as made to Exhibit 19, is a transcript of record in the Supreme Court of the United States, October Term, 1898, Case No. 154, entitled "Northern Pacific Railway Company vs. James DeLacey" reported in 174 U. S. 622.

Northern Pacific Railway Exhibits 25-A and 25-B are, respectively, the decree and mandate of the Supreme Court in said case.

Northern Pacific Exhibit 26, received in evidence over the same objection of plaintiff as made to Exhibit 19, is an exemplified copy of the various pleadings and orders in Case No. 600 in the Circuit Court of the United States for the District of Washington, Western Division, entitled "United States of America vs. Northern Pacific Railroad Company et al."

The material facts shown by Northern Pacific Exhibits 25, 25-A, 25-B, and 26 are set forth in that part of the amended and supplemental answer of defendant Railway Company contained in lines 15 to 33 and 37 to 40 on page 51 and lines 1 to 14 on page 52, which describes the decisions and holdings in the cases referred to in said exhibits, and to avoid repetition are not stated here.) (40-44)

NORTHERN PACIFIC EXHIBIT 28

(This exhibit, received in evidence over the objection that it was incompetent, irrelevant, and immaterial, and that
1207 laches and equitable estoppel are not a defense to this suit, is a certified copy of a letter dated February 18, 1905, from the Secretary of the Interior, addressed to Attorney General Moody. (A copy of said letter is printed, pages 2005-2007, Joint Committee Record.) In said letter the Secretary referred to opinion of Attorney General Harmon of February 6, 1897 (21 Op. A. G. 486), and stated that it was being strongly urged that because of matters erroneously assumed as a basis for the opinion or not stated and therefore not considered, the conclusion reached in said opinion was erroneous, and an opinion was requested in reference to the successorship of the Northern Pacific Railroad land grant. The letter stated that the papers filed in the Department upon the subject were being transmitted and shows that the following papers went along with the letter:

Letter of Francis Lynde Stetson, general counsel, and Wm. N. Cromwell, associate counsel, dated New York, January 27, 1897, transmitting copies of title deeds of the Northern Pacific Railway Co. covering the period between July 2, 1864, and August 18, 1896, embodied in a communication dated January 27, 1897, with the papers. (Summary of said letter and list of papers transmitted with it are given below.)

Opinion of Assistant Attorney General, dated February 1, 1897, that the title will inure to the Northern Pacific Railway Co. even if the patents run to the Railroad Company.

Letter of Stetson & Cromwell, counsel, Northern Pacific Railway Co., dated January 18, 1897, submitting arguments for the patenting of lands to the Northern Pacific Railway Co.

Letter of Charles and C. E. Gibson, dated St. Louis, Mo., December 29, 1896, protesting against the patenting to the Northern Pacific Railway Co. of lands granted to the Northern Pacific Railroad Co., and inclosing lengthy statement, description of certain lands and a copy of S. R. 124, Fifty-fourth Congress, first session, "A joint resolution to facilitate the reorganization of the Northern Pacific Railroad Co.' all with the papers.

1208 Letter of Britton & Gray, dated October 16, 1896, addressed to the Commissioner of the General Land Office, asking that future patents issued under the grant of July 2, 1864, and May 31, 1870, for lands within the districts covered by two inclosed deeds from Alfred L. Cary and an inclosed general land deed to the Northern Pacific Railway Co., be issued in the name of the Northern Pacific Railway Co., and patents for lands in the State of North Dakota lying east of the Missouri River and in the State of Minnesota be issued to the Northern Pacific Railroad. The three inclosures mentioned are with the papers.

Pencil memorandum giving the area of lands embraced in Northern Pacific Idaho Lists 10 and 12, Washington Lists 48, 49, 50, 51, and 47, Montana List 32, and Oregon List 3, amounting to 21,195.69 acres.

Opinion of Attorney General, dated February 6, 1897, that applications for patent by the Northern Pacific Railway Co. should be treated exactly the same as if they had been made by the Northern Pacific Railroad Co.

Title deeds and decrees showing conveyance by and reconveyance to the Northern Pacific Railroad Co. in the year 1875 upon the rearrangement of its financial affairs by its stockholders, bondholders, and creditors.

Certified copy of the final decree of the Circuit Court for the Eastern District of Wisconsin in case of The Farmers' Loan &

Trust Co. v. The Northern Pacific Railroad Company et al., entered April 27, 1896.

Letter of J. P. McCullen to the department under date of September 16, 1904, asking if the original Northern Pacific Railroad Co. created by Congress in 1864 is not the owner of the lands for which the department is issuing patents to a Wisconsin corporation known as the Northern Pacific Railway Co., and inquiring as to the preemption and settlement of the lands.

Letter from J. P. McCullen to the department under date of October 6, 1904, inclosing copies of two letters to himself from the Commissioner of the General Land Office under date of October 3, 1904, and copy of his letter to the commissioner dated October 6, 1904.

Letter from the Commissioner of the General Land Office to the department, dated October 11, 1904, stating that the questions presented by Mr. McCullen can only be answered by the department.

Letter of J. P. McCullen dated October 27, 1904, asking permission to appear before the department with documents.

1209 Letter of J. P. McCullen dated December 19, 1904, inclosing supplemental brief in support of the protest against the issuance of patents to the Wisconsin corporation known as the Northern Pacific Railway Co. Brief with the papers.

Letter of J. P. McCullen dated November 12, 1904, inclosing statement embodying his correspondence with the department. Statement with the papers.

Letter of J. P. McCullen, dated December 7, 1904, addressed to S. V. Proudfit, first assistant attorney, Department of the Interior, acknowledging receipt of a letter dated December 6, 1904, informing Mr. McCullen that he will be permitted to be heard before the Assistant Attorney General for the Department of the Interior on December 16, 1904, at 10 a. m. and stating that he will be present.

Petition of Jay Cooke and Charlemagne Tower, trustees, and others, complainants, against the Northern Pacific Railroad Co., defendant.

Newspaper clipping containing an article entitled, "The passing of the Northern Pacific Railroad Co."

Certified copy of order and decree amending decree filed August 7, 1875, suspending sales until further order of the Circuit Court of the United States for the Southern District of New York in the case of Jay Cooke, et al., complainants v. The Northern Pacific Railroad Co., defendant.

Copy of bill in equity, Joseph Hoover et al. v. The Northern Pacific Railway Co. in the Circuit Court for the Southern District of New York.

Brief of Joseph P. McCullen in support of the protest against the issuance of patents for the lands claimed by the Northern Pacific Railway Co.

Copies of "Original interests" agreements, dated January 10, 1867, and July 31, 1867.

Copy of affidavit of defense, filed December 21, 1878, in Court of Common Pleas No. 4, of Philadelphia, Samuel Eby v. Northern Pacific Railroad Co.

Copy of letter of J. Gregory Smith, president of Northern Pacific Railroad Co., to Hon. Thaddeus Stevens, Member of Congress, dated April 25, 1866.

Certified copy of answer of George Gray, defendant's attorney, filed in the New York Supreme Court, in the case of Hiram Barney v. Northern Pacific Railroad Co.

1210 The letter of January 27, 1897, from Messrs. Stetson and Cromwell, addressed to the Secretary of the Interior, Hon. D. R. Francis, states that upon request to file in the department copies of title deeds of the company intermediate July 2, 1864 and August 18, 1896, evidently referring to the transactions of 1875, they were complying with the request by the accompanying communication which in part is as follows:

SIR: In addition to the—

A. Original general land deed made to the Northern Pacific Railway Co., by Alfred L. Cary as special master, on August 18, 1896, under the decrees therein recited, in foreclosure of certain mortgages made by the Northern Pacific Railroad Co.; and

B. Original general railroad deed made to the Northern Pacific Railway Co., by said Alfred L. Cary as special master, on August 18, 1896, in like proceedings—

we now beg leave to also file in the Department of the Interior the following described certified copies of:

1. Deed from Northern Pacific Railroad Co. to George W. Cass, receiver, dated May 1, 1875.

2. Final decree of sale entered by the United States Circuit Court for the Southern District of New York, August 6, 1875, in the action wherein Jay Cooke and others were complainants and the Northern Pacific Railroad Co. was defendant.

3. Deed from Oliver Fiske and Kenneth G. White, masters, to Johnston Livingston, Frederick Billings, James K. Moorhead, John N. Hutchinson, George Stark, and John M. Denison, a committee of bondholders of the Northern Pacific Railroad Co., dated September 17, 1875.

(This deed also contains a copy of the appointment of a purchasing committee to carry out a plan for the rearrangement of the company's affairs, and also a copy of the decree of confirmation.)

4. Deed from George W. Cass, receiver, to Johnston Livingston, Frederick Billings, James K. Moorhead, John N. Hutchinson, George Stark, and John M. Denison, committee of bondholders of the Northern Pacific Railroad Co., dated September 28, 1875.

1211 5. Deed from Jay Cooke and Charlemagne Tower, trustees, to Johnston Livingston, Frederick Billings, James K. Moorhead, John N. Hutchinson, George Stark, and John M. Denison, committee of bondholders of the Northern Pacific Railroad Company, dated September 27, 1875.

6. Deed from Johnston Livingston, Frederick Billings, James K. Moorhead, John N. Hutchinson, George Stark, and John M. Denison, committee of bondholders of the Northern Pacific Railroad Co., to Northern Pacific Railroad Co., dated March 22, 1882.

7. Deeds from George W. Cass, receiver, and Jay Cooke and Charlemagne Tower, trustees, to Frederick Billings, dated December 16, 1876. (Relating to lands then actually patented.)

8. Deeds from Frederick Billings to Northern Pacific Railroad Co., dated December 16, 1876. (Relating to lands then actually patented.)

9. Certified copy of the charter of the Northern Pacific Railway Co., with certificates showing compliance with the laws of the States of Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon, besides the State of Wisconsin.

10. Final decree of United States Circuit Court for the Eastern District of Wisconsin, entered on April 27, 1896, in the certain action therein pending between the Farmers' Loan & Trust Co., as trustee, complainant, and the Northern Pacific Railroad Co., et al., defendants, under which all the railroad, land grant, and other property of the Northern Pacific Railroad Co. were duly sold on July 27, 1896, to the Northern Pacific Railway Co., the purchaser thereat.

NORTHERN PACIFIC EXHIBIT 29

(This exhibit, received in evidence, is a copy of a portion of the record in the 1875 foreclosure suit filed in the Circuit Court of the United States for the Second Judicial Circuit and Southern District of New York by Jay Cooke and Charlemagne Tower, trustees, and others, against the Northern Pacific Railroad Company. (46) It contains the petition of Cooke and Tower, dated August 4, 1875, copy of which appears on pages 701 to 703 of the Joint Committee Record. This petition states, among other things, that by the construction of over 500 miles of the

1212 railroad, the defendant had earned large quantities of land in the State of Minnesota and the Territories of Wash-

ington and Dakota; that a portion of the lands earned had been patented by the United States, and that other portions earned have been certified to the company but the Government refused to issue patents because of the non-payment by the company of the costs required to be paid by Act of Congress as a condition precedent to the issuance of patent; that portions of the lands earned had not yet been surveyed and remained an unascertainable part of the public domain and that the right or interest of said Railroad Company in and to said lands was vague and in the nature of a floating claim or right; that the portion of the surveyed lands so earned but not yet patented or certified had not been determined by any authority to belong or inure to the Railroad Company or be subject to satisfaction of the land grant; that it was an impossibility to sell lands earned by the Railroad Company that were not yet surveyed; that surveyed lands not patented to the Railroad Company could not be sold because the interest of the Railroad Company in such lands had not been ascertained; and that the only lands embraced in the deed of trust that could be sold under the decree by sections, or subdivisions of a section, or otherwise, were lands which had been patented to the company and remained undisposed of. The petitioners prayed that the decree be amended to order that the property of the Company (except the lands which had been patented or certified) be sold in an entire parcel as an entirety, and that the lands which had been patented or certified and remained undisposed of at the time of sale be sold at public sale within the States and Territories in which they were situate.)

1213 NORTHERN PACIFIC EXHIBIT 30

(This exhibit received in evidence, is exemplified copy of the final decree in the suit in the Circuit Court of the United States for the Second Judicial Circuit, Southern District of New York, in which Jay Cooke and Charlemagne Tower were complainants and the Northern Pacific Railroad Company defendant. Said decree consists of a decree filed May 12, 1875, and of an amending order and decree filed August 7, 1875 (printed pages 697–700, inclusive, and 704–705, inclusive, of Joint Committee Record). In the decree filed May 12, 1875, the Court found that the mortgage or deed of trust dated July 1, 1870, and the bonds secured thereby were a first lien on all the estate, title and interest of Northern Pacific Railroad Company with all the rights, liberties, franchises, including the franchise to be a corporation, and property of every description of said Railroad Company; that a balance remained due and unpaid on certain interest warrants and coupons that fell due prior to January 1874; that the coupons

or interest warrants on all bonds had been in default and were unpaid since and including those that fell due January 1, 1874; that the default in payment of interest warrants or coupons still continued; and that the principal of all bonds secured by the mortgage was due and payable. That the Northern Pacific
1214 Railroad Company, about April 27, 1875, executed and delivered unto said Cooke and Tower, the Trustees, an instrument or deed of further assurance in furtherance of the mortgage and the provisions thereof, conveying to them all the property of said Railroad Company and all the franchises, including the franchise to be a corporation. The Court ordered and adjudged that all the property of the Northern Pacific Railroad Company, except the lands and land grants, should be sold in one parcel as an entirety under the direction of Oliver Fiske and Kenneth G. White, as Master Commissioners, at public auction. It was ordered that the lands and land grants should be sold at public sale within the states and territories in which situated after not less than sixty days previous notice in single sections or subdivisions to the highest bidder. In the amending order and decree filed August 7, 1875, the Court found that portions of the lands earned had not yet been surveyed and remained an unascertainable part of the public domain and that the right or interest of said Railroad Company in and to said lands was vague and in the nature of a floating claim or right; that
1215 the portion of the surveyed lands so earned but not yet patented or certified had not been determined by any authority to belong or inure to the Railroad Company, or be subject to satisfaction of the land grant; that it was an impossibility to sell lands earned by the Railroad Company that not yet were surveyed; that surveyed lands earned but not certified to the Railroad Company could not be sold because the interest of the Railroad Company to or in such lands had not been ascertained.

The court further found:

"that thereby lands embraced in the said Deed of Trust that can be sold under the decree in this cause, by sections or subdivisions of a section, or otherwise, are those lands which have been patented or certified to said defendant, by the United States or their Land Officers, remaining undisposed of by the said defendant and trustees in accordance with the provisions of said Deed of Trust; and that an attempted sale by the Master Commissioners of the said Company's interests in lands, uncertified or unsurveyed would pratically be of no pecuniary benefit to the cestui quo trust."

The court ordered the said trustees to file with the Clerk of the Court a verified complete list of all the lands of said Railroad

Company that had been conveyed to the company by patent of the United States or certified to or for said company by the Land Officers of the United States and remaining undisposed of by said company and trustees, describing the said lands by legal descriptions and quantities, those being the lands excepted from the sale made by the said Master Commissioners. Pursuant to this amended decree the railroad, its equipment, franchises and land grant, except the lands patented and certified, were directed to be sold in one parcel, and the sale of the patented and certified lands was stayed until further order and direction of the court.)

1216 NORTHERN PACIFIC EXHIBIT 31

(This exhibit is a copy of a deed dated September 17, 1875, made by Oliver Fiske and Kenneth G. White, Master Commissioners appointed by the decree of the Circuit Court of the United States, Southern District of New York, in the 1875 foreclosure suit, as parties of the first part, and Johnston Livingston and five others, as the committee appointed under the plan of the holders of First Mortgage bonds of the Northern Pacific Railroad Company, parties of the second part. (A copy of said deed appears in the Joint Committee Record, pages 714–723.) There are recitals as to the entry of the final decree of the court on May 12, 1875, as amended August 6, 1875, in which the court determined that the mortgage of July 1, 1870, and the bonds issued under it were and are a first and paramount lien upon all the right, title, and estate of the Northern Pacific Railroad Company, together with all the rights, franchises, including the franchise to be a corporation, and property of every description; that a balance remained due and unpaid on certain interest warrants and coupons which fell due prior to January 1874; that the interest warrants or coupons on all of the bonds that fell due on the first day of January 1874 and subsequently thereto were in default and unpaid; that portions of the lands earned by said Railroad Company by partial construction of its railroad never had been surveyed; that the portion of the surveyed lands so earned but not yet patented or certified had not been ascertained or determined to belong or inure to said Railroad Com-
1217 pany or be subject to the satisfaction of its land grant; that it was adjudged and decreed that the property of said Railroad Company, together with all its rights and franchises, including the franchise to be a corporation (except the lands therein specially provided for), be sold as an entirety under direction of said Fiske and White, as Master Commissioners, at public auction in front of the Custom House, City of New York;

that said Master Commissioners should give sixty days' notice of the time and place of the sale and description of the property to be sold by advertisement once in each week for at least sixty days before the sale in newspapers published in Boston, New York City, Philadelphia, Baltimore, and Chicago; that at the time and place provided for said sale said Master Commissioners, in accordance with said decree and amendments thereof, offered for sale at public auction the property as in the decree and said mortgage or deed of trust described (excepting the lands that had been conveyed to said Railroad Company by letters patent of the United States or certified to said company remaining undisposed of); and that they sold the same to Johnston Livingston and five others, as the committee appointed under the plan of the holders of First Mortgage bonds of said Railroad Company, for the sum of $100,000, that being the highest bid. The plan adopted June 30, 1875, by the holders of bonds is set out in full. It is recited that the full payment in cash was made to said Master Commissioners; that they made their report of the sale; that on August 25, 1875, the court entered an order and
1218 decree of confirmation that is set out in full. Then follow paragraphs that the indenture was made September 17, 1875, by and between said Master Commissioners, as parties of the first part, and said Johnston Livingston and five others, as the committee appointed under the plan of the holders of the First Mortgage bonds, as parties of the second part, and granting, bargaining, conveying and confirming unto the parties of the second part, as joint tenants, and to the survivor or survivors of them, their successors and assigns, all the property of said Northern Pacific Railroad Company, together with all the rights, franchises, including the franchise to be a corporation, and property of every description (excepting lands patented or certified) as an entirety. The deed is signed by the two Master Commissioners, witnessesd, and acknowledged.) (47)

NORTHERN PACIFIC EXHIBIT 32

(This exhibit, received in evidence, is original deed made by George W. Cass, as Receiver in the equity suit pending in the Circuit Court of the United States for the Second Judicial Circuit and Southern District of New York between Jay Cooke and Charlemagne Tower, Trustees and others, complainants, and the Northern Pacific Railroad Company, defendant. (A copy of said deed is printed in Joint Committee Record, pages 725–727, inclusive.) It is recited that said Receiver was appointed by order made April 16, 1875, and that he qualified and entered on discharge of his duties; that in obedience to said order the

Northern Pacific Railroad Company, by its officers, made a deed of conveyance May 1, 1875, to said Cass, as Receiver, of all of its property, rights and franchises. The offices in which
1219 said deed was recorded are listed. There are references to the final decree and the sale made by the Master Commissioners and recital that the sum of $100,000 received at said sale is insufficient to satisfy the indebtedness incurred by the Receiver; that his accounts could not be audited or confirmed for a long time to come; that in the order confirming the report of sale made by said Master Commissioners there was provision for security to be furnished by the purchasers of the amount necessary to meet the requirements and indebtedness of said Receiver and upon the furnishing of adequate security to be approved by the Court that he, the said Cass, Receiver, make good and sufficient deed or deeds of conveyance to the purchasers of all the property, rights and franchises sold. The deed is dated September 28, 1875. The parties of the second part are Johnston Livingston and five others, as the committee appointed under the plan of the holders of the First Mortgage bonds. It conveys all the property of the Railroad Company, including all the property, rights and franchises mentioned in the deed executed by the Railroad Company to said Cass, Receiver, May 1, 1875 (excepting land patented or certified to the company), as an entirety in consideration of the sum of $1.)

NORTHERN PACIFIC EXHIBIT 33

(This exhibit, received in evidence, is a copy of a deed dated September 27, 1875, made by Jay Cooke and Charlemagne Tower, Trustees, parties of the first part, to Johnson Livingston and five others, as committee of bondholders, parties of the second part. (A copy of said deed is found at pages 727–731 of
1220 the Joint Committee Record.) It was recited that about April 27, 1870, the Northern Pacific Railroad Company, in pursuance of Article 15 of the mortgage or deed of trust executed a deed of further assurance conveying to said Cooke and Tower, as Trustees, all of the property of said Railroad Company, including the franchise to be a corporation; that by the final decree of the Court and amendments thereto it was ordered that the property of the Railroad Company, excepting lands patented and certified to said Company by the United States, should be sold in one parcel as an entirety; that the sale had been made; that by the decree of confirmation it was ordered that upon the purchasers furnishing to the Receiver security to be approved by the Court for payment of all allowances and indebtedness incurred by him as found due, said Trustees should

execute and deliver a deed or deeds conveying to the purchasers all the property, rights and franchises sold and all their and each of their right, title, interest and estate therein. The deed conveyed to the parties of the second part, as joint tenants, and to the survivors or survivor of them, their successors and assigns, all the property sold by the Master Commissioners, together with all the rights, franchises, including the franchise to be a corporation, and property of the Railroad Company, and all accessions thereto at the time of sale (except lands patented or certified to the company by the United States), as an entirety in consideration of the sum of $1. The deed is signed by said Cooke and Tower, as Trustees, witnessed and duly acknowledged.)

NORTHERN PACIFIC EXHIBIT 34

(This exhibit, received in evidence, is original copy of deed dated December 16, 1876, made by George W. Cass, Re-
1221 ceiver, party of the first part, Jay Cooke and Charlemagne Tower, Trustees, parties of the second part, and Frederick Billings, Trustee, party of the third part. (A copy of said deed is printed pages 735–737 of Joint Committee Record.) There are recitals that in the mortgage dated July 1, 1870, it was provided that the Northern Pacific Railroad Company at all times should be at liberty to contract for the sale of any lands granted to the Company at such prices approved by the Trustees as should be reasonable, and that the Trustees would execute to the purchaser a release of the lands so sold from the lien of the mortgage; that pursuant to order of the Court the Railroad Company made to said Cass, Receiver, its deed dated May 1, 1875, conveying to said Cass, as Receiver, the lands and property of the Railroad Company; that by order of the Court made April 14, 1875, as modified January 11, 1876, it was ordered that sales of lands that had been patented or certified to the Railroad Company might be made by said Receiver in like manner as similar contracts were made before appointment of the Receiver; that the deeds of such lands be made by said Receiver in conjunction with the Trustees; that such deeds should vest title to the lands in the purchasers as fully, to all intents and purposes, as the Company, in conjunction with the Trustees, could have done, free from any incumbrances created by said mortgage; and that the proceeds of all sales of lands be deposited with the Receiver, to be applied in accordance with orders of the Court; that said party of the first part had contracted to sell to the party of the third part the lands described free from the incumbrances of the mortgage and that said Trustees had become parties thereto for the purpose of

verifying their approval and releasing said lands from all
1222 incumbrances by reason of said mortgage. The parties of the first part and second part, in consideration of $536,855 conveyed to said third party 214,742 acres by legal descriptions situated in Cass County, Minnesota. The deed was signed by said Cass, as Receiver, and Jay Cooke and Charlemagne Tower, as Trustees, and duly acknowledged.) (48)

NORTHERN PACIFIC EXHIBIT 35

(This exhibit, received in evidence, is original of deed dated December 16, 1876, made by Frederick Billings, party of the first part, to the Northern Pacific Railroad Company, a corporation, party of the second part. (A copy of said deed is printed at pages 737–738 of Joint Committee Record). There are recitals that the party of the first part was, by resolution of the committee appointed by the bondholders of the Northern Pacific Railroad Company under the plan of reorganization, authorized and appointed to make the purchase of the lands therein described from Cass, the Receiver, for all holders of First Mortgage bonds who assented to the plan of reorganization and who had or should become corporators of the Northern Pacific Railroad Company, as the same was reorganized under the plan aforesaid and under the sale and purchase of the railroad, property, rights, and franchises of the Northern Pacific Railroad Company, including the franchise to be a corporation, made August 12, 1875, and as a corporation existing under the Act of Congress, namely, the Northern Pacific Railroad Company, party of the second part. That said party of the first part had made the purchase and
received a deed of conveyance in his own name, but for the
1223 purposes and objects therein mentioned. The consideration named is $1 and the land in Cass County, Minnesota, is conveyed by legal descriptions that was described in Northern Pacific Exhibit 34.) (48)

NORTHERN PACIFIC EXHIB. 36

(This exhibit, received in evidence, is paragraph taken from page 737 of the Joint Committee Record, as follows:

"On the same date, December 16, 1876, there were also executed nine other conveyances in precisely the same form by George W. Cass, receiver, and Jay Cooke and Charlemagne Tower, trustees, to Frederick Billings, of lands as follows: 84,073.68 acres, Becker County, Minnesota, consideration $210,184.20; 147,694.73 acres, Otter Tail County, Minnesota, consideration $369,236.83; 99,926.57

acres, Wadena County, Minnesota, consideration $249,816.83; 17,958.37 acres, Polk County, Minnesota, consideration $44,895.93; 199,565.02 acres, Clay County, Minnesota, consideration $498,912.55; 44,225.55 acres, Todd County, Minnesota, consideration $110,563.87; 8,266.05 acres, Morrison County, Minnesota, consideration $20,665.13; 21,797.31 acres, Aitken County, Minnesota, consideration $54,493.28; 601.91 acres, Cass County, Territory of Dakota, consideration $1,504.78)" (49).

NORTHERN PACIFIC EXHIBIT 37

(This exhibit, received in evidence, is paragraph from page 738 of the Joint Committee Record, and states that on the same date, December 16, 1876, there also were executed nine other conveyances in precisely the same form, consideration of $1 in each instance, by Frederick Billings to Northern Pacific Railroad Company of the land described in Northern Pacific Exhibit 36) (49).

NORTHERN PACIFIC EXHIBIT 38

(This exhibit, received in evidence, is original deed (copy thereof being printed on pages 731–735, inclusive, of the Joint
1224 Committee Record) made by Johnston Livingston and five others as the committee appointed under the plan of the holders of First Mortgage bonds of the Northern Pacific Railroad Company adopted June 30, 1875, parties of the first part, and the Northern Pacific Railroad Company, a corporation under the laws of the United States, party of the second part. It is dated March 22, 1882. It contains recitals of a final decree in the suit pending in the United States Circuit Court, Second Judicial Circuit and Southern District of New York, wherein Jay Cooke and Charlemagne Tower, Trustees, et al., were complainants, for the sale of the railroad with all its rights and franchises, including the franchise to be a corporation (except certain lands); that during the pendency of the case on June 30, 1875, at a meeting of holders of First Mortgage bonds a plan of reorganization was adopted and the parties of the first part were named a committee for purchasing the property for the benefit of all those assenting to said plan and to do all things necessary to the execution of the plan, and to place the railroad and property again under the control of a board of directors to be elected by preferred stockholders; that the parties of the first part purchased the railroad and franchises, including the franchise to be a corporation; that on September 29, 1875, the parties who had complied with the said plan met and as preferred stockholders and corporators organized by electing from their number a board of directors, in accordance with the provisions of the company's charter, and

the parties of the first part as a committee placed the railroad and property under the management of said board
1225 of directors; that on the same day prior to the reorganization the parties of the first part adopted a preamble and resolution in which the committee resolved that it or the survivors, or their successors, would whenever requested by the Railroad Company, its successors or assigns, execute and deliver such deed or instrument as said Railroad Company might advise or require for the better or more effectual securing and assuring the title; that on March 22, 1882, the committee adopted a preamble and resolution in substance that counsel had advised that for purpose of continuity of record title a formal conveyance was desirable, and it was resolved that the members of the committee as the committee would make and deliver to the Railroad Company the deed of conveyance of the railroad, property, franchises, including the franchise to be a corporation, as conveyed to the committee, and also all the rights, interests and causes of action acquired by the committee through the foreclosure proceedings and sale. Then follows the granting paragraph that in consideration of the premises and of $1 paid to the parties of the first part, said parties of the first part, as the committee aforesaid, granted and conveyed and confirmed unto the party of the second part, its successors and assigns, the railroad and property and rights of property, franchises, including the franchise to be a corporation, mentioned and described in the deed of conveyance of the Master Commissioners, Trustees and Receiver, and also all rights, claims and causes of action devolving upon the parties of the first part, as such committee, through the foreclosure proceedings and sale. The deed is signed by the six persons as the committee appointed under the plan of reorganization adopted at the meeting of the bondholders, is duly witnessed and acknowledged) (50).

1226 *Northern Pacific exhibit 39*

(This exhibit, received in evidence subject to the objection that it is irrelevant and immaterial, does not constitute knowledge, and neither laches nor equitable estoppel is a defense in this action, is a copy of an excerpt from the annual report of the Northern Pacific Railroad Company for the year ending June 30, 1875, as follows:

OFFICE OF THE NORTHERN PACIFIC RAILROAD COMPANY,
No. 23 Fifth Avenue, New York, November 12th, 1875.

Hon. ZACHARIAH CHANDLER,
Secretary of the Interior, Washington, D. C.

SIR: In compliance with the 20th Section of the Act of Congress of July 1st, 1862, and the Acts supplementary thereto, re-

quiring from the Pacific railroads annual reports under certain specified heads to be made to the Department of the Interior, I have the honor to submit to you the Annual Report of this Company for the fiscal year ending June 30th, 1875.

On the 16th day of April 1875, by an order of the Circuit Court of the United States for the Second Judicial Circuit and Southern District of New York, I was appointed Receiver of the Northern Pacific Railroad Company and all its property of every nature and description whatsoever, and qualified for the trust pursuant to the order, and entered on the execution of the duties of the office, and still exercise them.

I report:

First. The names of the stockholders of the Northern Pacific Railroad Company and their places of residence, so far as the same can be ascertained are as follows, to wit: * * * Minnesota, Dakota, and Pacific Divisions was $178,391.98.

Seventh. The Earnings of the Road for the fiscal year ending June 30th, 1875, were $605,041.63.* The expense of Operating the road for the same period was $501,489.36. The Net Earnings for that period were $103,552.27.

1227 Eighth. For a "statement of the expense of the road and its fixtures" I beg leave to refer to the last annual report of the Company under this head.

Ninth. "A statement of the indebtedness of the Company with the various kinds thereof"—is as follows:

First Mortgage Bonds	$30,207,500.00
Land Warrant Bonds and Script issued for interest	753,000.96
Floating Debt, mainly notes of the Company	683,000.00
	$31,643,500.96

It is proper to add that since the close of the fiscal year for which this report is made, the mortgage of the Northern Pacific Railroad Company, authorized to be made by Public Resolution of the Congress of the United States No. 44, approved May 31, 1870, was foreclosed by a decree of the United States Circuit Court; and by subsequent orders of said Court, all the Company's property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation, but excepting its patented and certified lands, were sold in New York City on the 12th day of August 1875, and the same were purchased by a committee appointed by the Company's bondholders, for account of the Bondholders. The Corporation as now existing will have $51,000,000 of "preferred" stock and $49,000,000 of "common" stock—making in all $100,000,000 of stock

as authorized by the Act incorporating the Company. The bondholders will, under the accepted plan of reorganization, surrender their bonds and receive "Preferred" stock to the amount thereof; and the stockholders of the Company will become "Common" stockholders.

Under this reorganization the Bond-debt of the Northern Pacific railroad company will be wholly extinguished, and the Company be free of debt.

Most Respectfully,

(Signed) G. W. CASS, *Receiver.*

1228 *NOTE.—The mail earnings for the Dakota Division 200 miles in length are not yet received from that Department and are not included in the above.

CITY AND COUNTY OF NEW YORK, *ss*:

George W. Cass, Receiver of the Northern Pacific Railroad Company being duly sworn deposes and says that the Report hereto annexed, dated November 12th, 1875, and addressed to Hon. Z. Chandler, Secretary of the Interior, is made in pursuance of the Acts of Congress regulating the reports of the Pacific Railroad Companies and the instructions of the Department of the Interior, and is true according to the books, accounts, and papers of the Company.

(Signed) G. W. CASS, *Receiver.*

Subscribed and sworn to before me this 12th day of November 1875.

[SEAL] (Signed) GEORGE FOLLETT (45),
Notary Public, City and County of New York.

NORTHERN PACIFIC EXHIBIT 40

(This exhibit, received in evidence over the same objection made to Exhibit 39, is a copy of an excerpt from the annual report of the Northern Pacific Railroad Company for the year ending June 30, 1876, submitted by Charles B. Wright, President, to Secretary of the Interior, September 13, 1876. It contains a statement that the Railroad Company was reorganized on
1229 September 29, 1875, under a plan adopted by the bondholders and under which the mortgage was foreclosed; on August 12 the Company and its property and franchises were sold under a decree of the Court and purchased by a committee of bondholders for the account of all of the holders of the Company's bonds and stock pursuant to the plan; the plan of reorganization provided for the conversion of the outstanding bonds

of the Company into preferred stock and its stock into common stock; up to June 30, 1876, of preferred stock there had been issued to bondholders who had surrendered their bonds for conversion 333,459 shares of $100 each, and scrip for fractions of shares amounting to $198,234; and no common stock had been issued.)

NORTHERN PACIFIC EXHIBIT 41

(This exhibit, received in evidence over the same objection made to Exhibit 39, is a copy of an excerpt from the annual report of the Northern Pacific Railroad Company, submitted by Charles B. Wright, President, to the Secretary of the Interior, September 27, 1877. It contains the same general statement appearing in the preceding Exhibit. It further states that up to June 30, 1877, $36,609,245.95 of "preferred stock" had been issued to bondholders who had surrendered their bonds for conversion and also in settlement of claims and salaries, and that 139,453 shares of common stock at $100 each had been issued.) (51)

NORTHERN PACIFIC EXHIBIT 42

(This exhibit, received in evidence over the same objection made to Exhibit 39, is a copy of excerpts from the report of the Northern Pacific Railroad Company, to the Auditor of
1230 Railroad Accounts, Department of the Interior, for the half year ending December 31, 1879. It states the following:

"The entire capital stock was issued under plan of reorganization, for particulars of which see enclosed circular" (52).

NORTHERN PACIFIC EXHIBIT 43

(This exhibit, received in evidence over the same objections as made to the previous exhibits, is certified copy of letter, dated January 27, 1897, from Francis Lynde Stetson, General Counsel in New York, and William Nelson Cromwell, Associate Counsel, addressed to Hon. D. R. Francis, Secretary of the Interior. Said letter is found at pages 3016-3017 of Joint Committee Record. This letter enumerated and transmitted a number of certified copies relating to the 1875 proceedings and the 1896 foreclosure, which were filed with the Secretary of the Interior) (52).

NORTHERN PACIFIC EXHIBIT 44

This exhibit, received in evidence over the same objections made to Exhibit 39, contains a certified copy of three letters, namely:

(1) Letter dated February 1, 1897, from the Office of the Assistant Attorney General, addressed to the Secretary of the Interior, signed by J. H. Leonberger. Said letter is found at pages 3017–3018, Joint Committee Record. Mr. Leonberger states that he has examined lists prepared by the Land Office certifying lands to the Northern Pacific Railway Company, also sundry title papers showing legal title to be in said Railway Company subject to a mortgage. The writer expresses no opinion upon the point as to whether the title granted to the Railroad Company is now vested in the Railway Company. He says it has been invariably held by this department that a right to a patent from the United States will not be traced beyond the original grantee and concludes for administrative reasons it will be unwise to certify lists in favor of the Northern Pacific Railway Company. He does not believe that the department can be required to depart from the ordinary course of business heretofore followed in other cases.

1231 (2) Letter dated December 29, 1896, written from St. Louis, Mo., addressed to David R. Francis, Secretary of the Interior, and written by Charles Gibson and C. E. Gibson. Said letter is found at pages 3051–3053, Joint Committee Record. It is summarized as follows:

The letter referred to Section 11 of the Act of July 2, 1864, which provides that the Northern Pacific road shall be subject to the use of the United States for postal, military, naval, and all governmental service and also subject to such regulations as Congress may impose restricting the charges for Government transportation. It states that the Northern Pacific Railroad Company, acting under the consent given by Congress by the Joint Resolution of May 31, 1870, issued several mortgages, but that the mortgages did not convey any of the rights or privileges reserved to Congress by the Act of 1864. It further states that default having been made in the payment of bonds secured by the mortgages, application was made by the trustee to the United States Circuit Court for the Eastern District of Wisconsin for the appointment of receivers. Receivers were appointed and in 1896 the court issued an order to sell all the property and the franchise of the Northern Pacific Railroad Company at public auction, and the same were sold to the Northern Pacific Railway Company, a Wisconsin corporation. This corporation entered into possession of the railroad and properties under its

1232 Wisconsin charter and has abandoned and repudiated the charter granted by the Act of 1864. The letter further states that the control of Congress over the railroad and telegraph lines and the important governmental rights reserved in the Acts

and Resolution formed the consideration for which the land grant was made, and that the Wisconsin Company by abandoning and repudiating the charter of July 2, 1864, has forfeited all right to the lands. The letter concludes with the request that the Northern Pacific Railway Company be required to answer the recited facts and show cause why all interest claimed to unsurveyed and unpatented lands should not be forfeited.

(3) Letter dated January 18, 1897, from Francis Lynde Stetson, General Counsel in New York, and William Nelson Cromwell, Associate Counsel, addressed to Hon. D. R. Francis, Secretary of the Interior, Washington, D. C. Said letter is found at pages 3049–3051 of the Joint Committee Record. It is summarized as follows:

The letter states that Britton & Gray of Washington informed the writers that Mr. Charles Gibson of St. Louis had filed a protest against further issue of patents for land within the grant of the Northern Pacific Railroad Company, and requested a public hearing before the Secretary upon his protest, and that the representatives of the company know of no reason, except personal, for such a protest. The writers are informed that the protest relates principally to alleged irregularities of reorganization 22 years ago prior to construction of the Railway as an
1233 entirety and prior to its repeated acceptance by the Government in all its departments; that express authority to mortgage all its property, including its franchise to be a corporation, was given to the Railroad Company and in compliance with such authority the Railroad Company executed its mortgage covering all its rights, its land grant, and its franchise to be a corporation. Default occurred under the mortgage. Foreclosure ensued in 1875 and resulted in sale of the mortgaged estate to a committee of the security holders, who by deed reconveyed the property to the same company whose franchise they had acquired. The corporation proceeded with its undertaking, which included construction of thousands of miles of railroad west of Minnesota and such action and construction received continuous and repeated recognition by successive Presidents of the United States, who accepted all the sections of railroad as constructed, by the Department of the Interior which issued patents for millions of acres and by Congress which passed repeated acts concerning the Northern Pacific Railroad Company, which, since 1875, was only this reorganized company. The letter states that even if a question as to the regularity of the title of the reorganized company to the property reconveyed to it could be raised, the question is not one properly urged upon consideration of the Secretary of the Interior; that patents must continue to issue; and if there is any question as to the respective rights of the original donee

and its subsequent transferees, it is more properly the sub-
1234 ject of decision in the courts when raised by some parties having an actual interest therein. It further states that the obligation to perform all public duties would rest on any purchaser under the mortgage and that no complaint has been made nor has any instance occurred in which either the original company or any transferee has failed fully to perform every requirement. The present transferee, Northern Pacific Railway Company, not only is purchaser of the rights of the former company under judicial decrees and deeds on file in the Department of the Interior, but also is owner and holder of 97% of stock and substantially the same amount of the bonds of the former corporation, secured by mortgages on file in the Department from the time of their execution. The letter concludes with the statement that it is not believed the Secretary would create an importance for Mr. Gibson's protest which it does not possess but that if the Secretary, in discharge of his public duty, should feel that the matter should be investigated, the company does not shrink from substantiating its position in every way that orderly public procedure of any Government department will permit.

1235 This exhibit also contains a copy of the opinion of Attorney General Harmon, dated February 26, 1897, reported in 21 Op. A. G., 486, in response to the request of the Secretary of the Interior to be advised whether he was justified in withholding patents from the Northern Pacific Railway Company on the grounds urged in the complaint filed by Mr. Gibson. The opinion stated that it is not suggested that the new company had threatened to repudiate its obligations under the original Act, that the Government might enforce all rights reserved to it against the State corporation now owning the property to the same extent as it could against the old company; and that the Secretary was not justified in refusing to issue patents to the Railway Company for the reasons stated in the communications submitted to him) (54).

NORTHERN PACIFIC EXHIBIT 45

(This exhibit, received in evidence over the objection: "Mr. McGowan: I just offer the general objection to it," is a copy of an address by Joseph P. McCullen of the Philadelphia Bar, made March 20, 1908, before the Senate Committee on Pacific Railroads, upon resolution introduced by Senator Heyburn, asking for inquiry as to the Northern Pacific Railroad reorganization. (54). His address is printed on pages 1645–1650 of the Joint Committee Record. In it he argued that the judgment of the United

States Circuit Court in 1875 was void and the sale thereunder transmitted no title; that the bondholders' organization which purchased the property resulted in formation of a new entity which was a partnership association or joint stock company; that
1236. the mortgages foreclosed in 1896 were not made by the Federal corporation, but were obligations created by the 1875 bondholders' organization; that the United States Circuit Court in Wisconsin in the 1896 foreclosure was without jurisdiction of the cause and that the legal title to the property and estate still remained in the Federal corporation created by the Act of 1864; that it was of public concern to ascertain whether the railroad and the lands granted were owned by a corporation created by Congress or whether through reorganization the legal title had passed to a state corporation free from the direct legislative control of Congress.)

NORTHERN PACIFIC EXHIBIT 46

(This exhibit is exemplified copy of the final decree of foreclosure filed April 27, 1896, and supplemental decree filed April 28, 1896, in the 1896 foreclosure proceedings (54). Said final decree and supplemental decree are printed, pages 1392–1412, of the Joint Committee Record. The material findings and provisions of said final decree and supplemental decree are stated in the amended and supplemental answer of defendant Railway Company, beginning line 22 on page 31, and ending with line 28 on page 32 of said answer.)

NORTHERN PACIFIC EXHIBIT 47

(This exhibit, received in evidence over the objection that it was irrelevant and immaterial, and that acceptance of the road by the Commission is not binding on plaintiff in connection with the measure of the grant across the State of Washington, is certified copy of the Executive Order of November 26, 1881, approving the report of the Commissioners appointed to examine the line of railroad beginning near Wallula, Washington, and ending near Eight Mile Prairie, Idaho) (55).

1237. HEARING AT SPOKANE, WASHINGTON, BEGINNING MAY 5, 1932

By Mr. LYONS. We offer Northern Pacific Railway Company's Exhibit No. 50, being an exemplified copy of all the entries and minutes in the case of "Crane et al., Plaintiffs, vs. The Northern Pacific Railway Company," in the District Court of the First Judicial District of the State of Idaho, in and for Kootenai County.

By Mr. McGowan. We object to this as not constituting any notice and as not tending to prove any defenses now before the Master.

By the Master. The objection will be overruled (56).

NORTHERN PACIFIC EXHIBIT 50

(This exhibit is an exemplified copy of all the entries and minutes in the case entitled "A. A. Crane and John B. Goode, copartners under firm name of Crane and Goode, Plaintiffs v. Northern Pacific Railway Company," in the District Court of the First Judicial District of the State of Idaho, in and for Kootenai County. It contains complaint and summons dated January 31, 1898, in a suit to recover a balance alleged due for ties sold and delivered in said Kootenai County March to August, inclusive, 1897. The answer, filed February 18, 1898, sets up copy of contract dated December 2, 1896, between said Railway Company and plaintiffs, and alleged breaches. The cause was removed to the United States Circuit Court for the District of Idaho, Northern Division, March 22, 1898.)

By Mr. Lyons. I offer Northern Pacific Railway Company's Exhibit No. 51, being an exemplified copy of the complaint,
1238 subpoena, stipulation in satisfaction of judgment, and dismissal of action in the case of "John F. Thompson, A. A. Crane, and John B. Goode v. The Northern Pacific Railway Company," in the Circuit Court of the United States, for the District of Idaho, Northern Division, in the Ninth Circuit.

By Mr. McGowan. We offer the general objection and on the further ground it doesn't tend to constitute any defense to the action.

By the Master. Objection overruled (56–57).

NORTHERN PACIFIC EXHIBIT 51

(This exhibit is an exemplified copy of the complaint, subpoena, stipulation in satisfaction of judgment, and dismissal of action in the case of "John F. Thompson, A. A. Crane, and John B. Goode vs. The Northern Pacific Railway Company," in the Circuit Court of the United States, for the District of Idaho, Northern Division, in the Ninth Circuit. This was a suit in equity. The subpoena was dated March 26, 1898. The complaint, filed March 25, 1898, alleged that a contract dated November 18, 1896, had been entered into between said Railway Company and A. A. Crane and John B. Goode, whereby said Crane and Goode were authorized to cut and remove all the timber from certain lands described in the complaint. The suit was to enjoin the forfeiture of the contract, to enjoin interference with workmen em-

ployed by plaintiffs in performance of the contract, and for specific performance.)

By Mr. LYONS. I offer the Northern Pacific Railway Company's Exhibit No. 52, being a certified copy of a letter from the Commissioner of the General Land Office to A. D. Thorp, Special Agent of the Land Office, dated July 6, 1900.

1239 By Mr. McGOWAN. Same objection as to previous exhibits.

By the MASTER. Same ruling.

Northern Pacific Exhibit 52

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 6th, 1900.

Case No. 27

Public Timber Trespass. A. A. Crane et al., under firm name of Crane, Goode & Company, Northern Pacific R. R. Co., Idaho

Mr. A. D. THORP,
Special Agent G. L. O., Spokane, Washington.

SIR: I am in receipt of your special report of June 5, 1900, in the above-entitled case, enclosing copy of contract made between the Northern Pacific Railway Co. and A. A. Crane, John B. Goode & Co., under which the latter cut timber from fractional Sec. 35, Tp. 48 N., R. 3 W., B. M. Idaho (with other lands).

This contract bearing date of December 31, 1896, verifies the statements embodied in your report of trespass, June 23, 1898, and refutes those of the attorneys for the Railway Co., who claimed, in protest again the action of this office, in demanding full value for the ties purchased by them, that such "action was predicated upon the express ground that said ties were cut under contract with said company," and that they were "confident your (this) office has no information to sustain such position." This point being established, the further reasons urged by the Railway Company for a settlement by them upon a stumpage basis, may be considered. The charge against the company, they state, is not for timber trespass, but for receiving ties known to have been cut from Government land, and in defense of this it is claimed that "for many years said company honestly believed it had good title to the odd-numbered sections within the Coeur d'Alene Indian Reservation * * * and if

it be conceded, therefore, which it is not, that said company gave a contract to Crane & Goode Co., to cut timber off said section, it must be at the same time admitted that it was done in the best of faith."

1240 It does not appear when the said Railway Co. ceased to hold the belief that it had "good title" to the lands involved, but inasmuch as the question of the right of the Northern Pacific Ry. Co. to the odd-numbered sections, within the ceded portion of the Coeur d'Alene Indian Reservation, was decided adversely to said company prior to the date of the said contract (see departmental decisions of April 13, 1895, 20 L. D. 332 and 26 L. D. 422) it can scarcely be urged that such belief was warranted at that time. The objection raised that Mr. J. F. Thompson (one of the members of said firm of A. A. Crane & John B. Goode Co.) was allowed to settle for one-half of the entire amount of railroad ties cut from this disputed section, upon a stumpage basis, while the full value of the balance, which was delivered to the railway company, is claimed of them, is met by the fact that Crane, Goode & Co. had not the slightest reason to doubt that the railroad company had a perfect right to make the contract under which the timber was cut; it having for years held control of said lands, collecting the stumpage from the settlers and in other ways giving evidence of the ownership claimed by the said railway company in the said contract. Moreover, the ties paid for by Mr. Thompson were those left upon the ground or piled in the woods for two years from the time of cutting and as you reported "would not bring the advertised price of 10 cents each, as two summers have elapsed since they were piled in their present position and are in all probability rotted in the center." Mr. Thompson submitted his proposition of settlement, urging the bona fides of his transaction with the railway company, based on the showing made by the said company that they were legally entitled to make a contract, and claimed that his company had taken every reasonable precaution to keep well within its rights in this matter, a view in which the Department concurred, when, under date July 11, 1899, the said proposition was accepted.

While agreeing entirely with the railroad attorney's assertion that this office "has no desire to deal unjustly in this case or to take any action against the Northern Pacific Railroad Co., which would not be taken against any other person or corporation;" the facts are such as to warrant the position heretofore taken, that the said company is liable to the Government for the full value of the ties purchased by it, at the price paid therefor.

You will so advise the said attorneys, Messrs. Stephens & Bunn, of Spokane, and renew the demand made for settlement in accordance with such holding.

Very respectively,

COMMISSIONER.

By Mr. LYONS. I offer Northern Pacific Railway Exhibit No. 53, being a certified copy of a letter from the Commissioner
1241 of the General Land Office to Messrs. Britton and Gray, Washington counsel of the Northern Pacific, under date of July 9, 1900, referring to this contract.

By Mr. MCGOWAN. Same objection.

By the MASTER. Same ruling (57).

Northern Pacific Exhibit 53

JULY 9, 1900.

Case No. 27

Messrs. BRITTON AND GRAY,
Attorneys at Law, Washington, D. C.

GENTLEMEN: Under date of the 6th instant, this office advised Special Agent A. D. Thorp that, inasmuch as it is shown by the copy of contract recently filed here, made between A. A. Crane, John B. Goode and Company, and the Northern Pacific Railway Co., that said contract empowered the former company to cut timber from Sec. 35, Tp. 48 N., R. 3 W., D. M., Idaho, and further, that, as at date of said contract it had been decided that these lands were Government property, the demand made upon the said Northern Pacific Railway Co. for the value of the ties purchased by them, at the price paid therefor, would be adhered to, and he was directed to so advise the attorney for the railroad, at Spokane, Washington, to that effect.

Very respectfully,

BINGER HERMANN,
Commissioner.

By Mr. LYONS. I offer Northern Pacific Railway Company's Exhibit No. 54, being a letter from A. D. Thorp, Special Agent, General Land Office, dated July 14, 1900, and other letters attached, all referring to the same subject to which the immediately preceding exhibits refer.

By Mr. MCGOWAN. Same objection.

By the MASTER. Same ruling (57).

1242 NORTHERN PACIFIC EXHIBIT 54

(This exhibit is composed of several letters summarized as follows: Letter of July 14, 1900, from Special Agent A. D. Thorp,

Spokane, Washington, to the Commissioner of the General Land Office, referring to Timber Trespass Case 27, acknowledging receipt of his letter of July 6, 1900, and stating that he has advised Messrs. Stephens and Bunn, Attorneys for the Northern Pacific Railway Company, of the Commissioner's decision, and has renewed demand for settlement in accordance with his holding; letter from Thorp to Commissioner of the General Land Office, dated July 20, 1900, transmitting letter from Stephens and Bunn, Spokane, Washington, to Thorp, dated July 17, 1900, which acknowledges receipt of his letter of July 14 enclosing letter from the Commissioner of the General Land Office and states that they will communicate with the General Counsel of the company and after being advised by him they will write Thorp further on the subject; letter from Thorp to Commissioner of the General Land Office, dated August 6, 1900, enclosing letter of July 26, 1900, from Stephens & Bunn to Thorp, dated July 26, 1900, advising him "that the Northern Pacific Railway Company declines to pay any sum on account of the ties in question, in excess of their stumpage value.")

By Mr. LYONS. I offer Northern Pacific Railway Company's Exhibit No. 55, being a certified copy of a tabulation showing the area lost to the Northern Pacific Railway Company in the primary limits of its grant, because classified as mineral under the Act of February 26, 1895, and the status as of December 31, 1921, of the lands so classified.

By Mr. MCGOWAN. We offer no objection to this at all (58).

1243 *Northern Pacific Exhibit 55*

Tabulation showing the area lost to the Northern Pacific Railway Company in the primary limits of its grant, because classified as mineral land under the act of February 26, 1895 (28 Stat. 683), and the status as of December 31, 1921, of the lands so classified

Total area classified mineral	Area disposed of		Area vacant except withdrawn		Area vacant	
	Mineral entries	Nonmineral entries	Surveyed	Unsurveyed	Surveyed	Unsurveyed
3,742,267.56	35,155.77	455,040.03	1,210,358.30	1,684,465.13	238,210.96	80,037.67

	Acres	Acres
Total area entered		520,195.50
Area vacant but withdrawn	2,894,823.43	
Area vacant not withdrawn	327,248.63	
Total area vacant		3,222,072.06
Grand total		3,742,267.56

1244 By Mr. LYONS. I offer Northern Pacific Railway Company Exhibit No. 56, being the timber sales receipts to the United States from timber cut from minerally classified odd sections in the National Forests in the four Land Districts in Montana and Idaho, namely Coeur d'Alene, Bozeman, Missoula and Helena.

The MASTER. Are those lands that are referred to there the lands involved in the alleged fraud of the classification of the Commissioners?

Mr. LYONS. Yes.

The MASTER. The Forestry Service cut the timber on the lands that were classed as mineral in those amounts, is that what that means?

Mr. LYONS. Yes. Mr. McGowan submitted this compilation at Mr. Kerr's request.

By Mr. MCGOWAN. We make the objection on the ground that it's immaterial.

By the MASTER. That objection will be overruled (58–58a).

NORTHERN PACIFIC EXHIBIT 56

(This exhibit is a tabulation of the timber sales receipts by the United States from timber cut from the odd-numbered sections in place and indemnity limits that were classified as mineral in the four land districts in Montana and Idaho, being Bozeman, Missoula, Helena, and Coeur d'Alene and that were included in National Forests. The figures were submitted by Mr. McGowan April 28, 1926, and were given at page 4243 of J. C. R. The tabulation is summarized as follows:

1245	Primary limits	Indemnity limits	Total
Montana	$389,483	$69,822	[illegible] 305
Idaho	829,021	77,651	906,672
Grand total			1,365,977

By Mr. LYONS. I offer Northern Pacific Railway's Exhibit 57, being a certified copy of a letter, dated February 1, 1908, signed by H. H. Schwartz, Chief of the Field Service, addressed to the Commissioner of the General Land Office, appearing at page 3952, Joint Committee Record (59).

By Mr. MCGOWAN. We object to this on the ground it's irrelevant and immaterial to any defense before the Master at this time, particularly equitable estoppel.

By the MASTER. The objection will be overruled for the present and the exhibit will be admitted (60).

Northern Pacific Exhibit 57

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 1, 1908.

HONORABLE COMMISSIONER: I return you herewith memorandum prepared by Division N for the Secretary's use, together with a letter from John A. Rowand of Helena, Montana, dated January 22, 1908, enclosing also a copy of his letter to the Secretary dated July 1, 1907. Attached to this correspondence is a memorandum reading—

"In view of the last statement in Rowand's letter, the Secretary wishes Mr. Schwartz to go over the case again and advise him."

The last statement referred to in Mr. Rowand's letter is as follows:

"I attach herewith a copy of the letter above referred to and I trust, Mr. Garfield, that you will give the matter referred to such consideration as will lead to an investigation of this gigantic fraud perpetrated on the United States Government and the people of the State of Montana in general."

1246 The subject-matter under consideration is the classification of the mineral and nonmineral character of the odd sections of public land lying within the limits of the land grant to the Northern Pacific Railroad Company.

This classification was provided for under the Act of February 26, 1895.

Generally speaking, the act provided for certain mineral classifiers organized into boards of three members. It was the duty of these classifiers, who were called "commissioners" to—

"make examination of the lands herein mentioned within their respective districts and they may also take the testimony of witnesses as to the mineral or nonmineral character of any of said lands and receive any other evidence relating to said matter and shall have power to summon witnesses to appear before them and to administer oaths, etc."

and after examining the lands and hearing testimony, where they thought advisable, to classify the lands as mineral or nonmineral; to file the classification with the local office in duplicate, one copy of which was forwarded to the Secretary of the Interior; the classification was to be published in a local newspaper; at any time within 60 days any party aggrieved by the classification would file a protest in the local land office and a hearing would be had.

"That as to the lands against the classification whereof no protest shall have been filed, as hereinbefore provided, the classi-

fication when approved by the Secretary of the Interior shall be considered final except in case of fraud, and all plats and records of the local and General Land Office shall be made to conform to such classification; all lands so classified as above without protest, and the classification whereof is disapproved by the Secretary of the Interior and all lands whereof the classification has been invalidated for fraud shall be subject to hearing and determination in such manner as the Secretary of the Interior may prescribe. And as to all such lands and as to the lands against the classification whereof protests may be filed, the final ruling made after the day set for hearing shall determine the proper classification."

From the above it appears that so long as any lands are unpatented the Secretary of the Interior may at any time order a hearing to determine whether any classification which has been finally approved was made in fraud. And, if the fraud is proven at any hearing, the classification may be set aside.

Under the instructions issued by the Department April 13, 1895 (20 L. D., 350), the Commissioners were required, among other things, to—

1247 "The examination in the field shall be as to each 40-acre subdivision and you will note carefully as evidence any testimony offered or facts observed relative to each particular tract or tracts adjacent thereto."

The reports made by the Commissioners show such examination.

In the case of Lamb et al. v. Northern Pacific Railroad Company (29 L. D., 102), the Department passed upon the question of "fraud" such as would warrant opening the Secretary's approval of any classification, and in that decision the Department, among other things, says (referring to the fact that it was charged the Commissioners did not personally examine the ground):

"If they did not make such personal examination, their report is equally fraudulent inasmuch as it asserted that they did so make them; it was an assertion of 'positive knowledge of what they did not know' and comes within Lord Kenyon's definition of a legal fraud and is what, in more recent times, judges and commentaries have classified as a case of fraud, without any disturbing adjective,"

and the Department ordered a hearing in the Lamb case to determine the truth of the charge.

Returning now to the particular complaint in John A. Rowand's letter to the Secretary, it appears that he made a mining application for certain mining claims; that the North-

ern Pacific Railroad Company protested his application because the lands had theretofore been classified as nonmineral and the classification finally approved by the Secretary. Thereupon Rowand charged that the classification was fraudulent. Eventually the Department ordered a hearing. As the subject-matter of the action was the land embraced in Rowand's mining claims, the General Land Office in considering a stipulation entered into at the trial by both parties, to the effect that all of NE¼ of Sec. 29, T. 14 N., R. 9 W. was mineral, held that the stipulation could only have effect as to the mining claims. On the stipulation, the classification of the land embraced in these mining claims as nonmineral was set aside.

It appears, however, that Rowand has mining locations upon a large part of the remaining lands in this NE¼ of Sec. 29 and he charges that the classification as to all of that quarter section was fraudulent and should be set aside. He states that the evidence submitted in the hearing between himself and the Northern Pacific abundantly proves that the classification of the quarter section was fraudulent. Also, he charged generally that the whole classification of the Northern Pacific lands was fraudulent in its general scope and plan of operation.

The evidence introduced in the case between Rowand and
1248 the Northern Pacific is sufficient to warrant the Secretary in ordering a hearing to determine the mineral or nonmineral character of the land embraced in Sec. 29, T. 14 N., R. 9 W., and whether said classification was fraudulently made.

As to Mr. Rowand's general charge that the classification as a whole was fraudulently made, it is undoubtedly true that a very large proportion of said classification was fraudulent within the rule laid down in the case of Lamb v. The Northern Pacific Railroad, supra, in this that the mineral classifiers reported to this office that they had made an examination of the land, when in truth and in fact they never did see the land and never had any advice or evidence as to what was the mineral or non-mineral character of the lands, and subsequently, relying upon the statement of the mineral land classifiers, the Secretary approved the classification and it became final.

However, the classification was not always to the liking of the Northern Pacific Railroad Company, and although it is undoubtedly true that the Northern Pacific field officers obtained considerable influence over the mineral land commissioners, it yet remains a fact that immense bodies of lands in Montana and Idaho were classified contrary to the wishes of the Northern Pacific Railroad Company.

The Northern Pacific Railroad Company for about three years kept several crews of mining experts and timber cruisers in the

field following up and examining the lands as fast as classified. Wherever the classification did not coincide with the reports made by these timber cruisers and mining men the Northern Pacific would file a protest against the classification. These protests resulted in many hearings before the Registers and Receivers.

One instance of a classification which was not to the liking of the Northern Pacific is that involved in Contest No. 2179 in which a letter by this office has now been before the Secretary for action for over six months.

In that classification the mineral commissioners represented that they had made examinations of a strip of country some 25 to 30 miles long and 4 to 10 miles wide, and classified the land as mineral. As a matter of fact they alleged to have examined this land during seasons when not even a young, active man with snowshoes would venture into that country; to say nothing of these broken-down, confederate brigadiers who were on the boards of classification. They assumed that country was mineral simply because it lays south of and was reached from the Coeur d'Alene mining camp.

In the same way they made a "guess" as to the mineral or non-mineral character of probably 80 percent of the lands alleged to have been examined by them.

1249 The Secretary should also be advised that, for one cause or another, the Board of Mineral-Land Classifiers failed to reach and classify odds and ends of the grant in each of the land districts covered by the Act of February 26, 1895.

SUMMARY

1st. The Secretary has authority to order a hearing in any case in which there is a charge that the classification was fraudulently made.

2nd. Wherever the evidence discloses that a classification was fraudulently made, the Secretary has authority to "determine the proper classification."

Respectfully,

(Signed) H. H. SCHWARTZ,
Chief of the Field Service.

By Mr. LYONS. I offer Northern Pacific Railway Company's Exhibit 58, being a memorandum, dated March 12, 1908, signed by H. H. Schwartz, Chief of the Field Service, of the Northern Pacific Land Grant, and particularly the Field classification, found at page 2479 of the Joint Committee Record.

By Mr. MCGOWAN. We object to this on the ground it's irrelevant and immaterial to any defense before the Master at this time, and particularly equitable estoppel.

By the Master. The objection will be overruled for the present and the exhibit will be admitted. (59–60)

NORTHERN PACIFIC EXHIBIT 58

(This exhibit is a memorandum dated March 12, 1908, signed by H. H. Schwartz, Chief of Field Service, Department of the Interior, General Land Office, Washington, D. C., and is summarized as follows:

Mr. Schwartz reviews the terms of the Act of July 2,
1250 1864, and the Resolution of May 31, 1870. He states that the Act of February 26, 1895, provided that the lands within the limits of the Northern Pacific grant in Idaho and western Montana should be "examined and classified by Commissioners, to be appointed as hereinafter provided, with special reference to the mineral or non-mineral character of such lands." He states that the Act provided for the appointment of three commissioners in each of the land districts of Bozeman, Helena, Missoula, Montana, and Coeur d'Alene, Idaho, at least one of whom should be a practical miner and resident of the district, and that under the regulations authorized by the Act and prepared by the Secretary, and also by the terms of the Act, the classifiers were required to examine the lands, and were authorized to administer oaths and take testimony in reference to the character of the lands. The classifications made each month were to be filed in the local land office and were advertised once a week for four consecutive weeks in a newspaper in the county where the land was located and also in a newspaper in the capital city of the State. Any party aggrieved might file a protest with a hearing before the Register and Receiver with an appeal to the General Land Office and thence to the Secretary of the Interior. The memorandum continues as follows:

Classifications finally approved by the Secretary of the Interior thereupon become final, "except in case of fraud."

The act also provided—

"That at such hearings the United States shall be represented and defended by the United States District Attorney or his assistants, for the judicial district in which the land is situated, unless the Secretary of the Interior shall detail some proper officer of the Department of the Interior for that purpose."

1251 PERSONNEL OF THE COMMISSIONERS

The appointment of the commissioners under this act was political. The two nonresident commissioners in each district were usually elderly men appointed from the Southern States,

and, of course, had absolutely no knowledge of mineral or mineral land indications in Montana or Idaho. The resident members of the Board were supposed to have been selected with some regard for their mineral knowledge but were really selected by reason of political consideration. It followed from all this that the Board itself did not have within it the knowledge or intelligence to make a proper classification.

METHODS OF EXAMINATION

The Northern Pacific Railroad Company represented to the various boards of mineral classifiers that inasmuch as it was vitally interested in the classification, the company should be permitted to designate a competent mining man or engineer to accompany the commissioners to the lands and observe or aid in the actual physical inspection thereof. As a consequence, the actual field trips were usually made by a party comprising some or all of the three Government commissioners, and a competent mining or land man on behalf of the railroad company. There was also usually a cook and a packer. Under the act the commissioners were paid $10 per day, and were required to furnish their own subsistence.

The expense of cook, packer, and subsistence was usually a matter of private arrangement between the representatives of the Government and the representatives of the road. These Government commissioners were not familiar with the mountains and were not inured to the hardships of traveling in the wilderness, and it is a matter of common knowledge throughout Montana and Idaho, that a very small per cent, indeed, of the lands classified were ever actually physically visited or inspected by the mineral-land classifiers. They usually kept closely to the better-traveled roads and trails and made more or less perfunctory inquiry in the different communities as to the mineral or nonmineral condition of the lands therein.

PROCEDURE BY THE RAILROAD COMPANY

Following more or less closely the progress of the classification, various field crews (a crew usually comprising four competent miners and timber men) in the employ of the Northern Pacific Railroad Company actually examined the lands classified. Their examination was for the purpose of qualifying such field crews as witnesses in any protests which the Northern Pacific might make, and also to furnish the Northern Pacific detailed information as to the presence or absence of mineral, the agricultural value, and the kind and amount of standing timber upon the lands classified.

In a large number of cases the Northern Pacific protested the classification of lands. Thereupon a hearing was ordered before the register and receiver on said classification. During the first year of the classification many of these protests went by default so far as the Government was concerned, the United States attorneys not finding time to attend the hearings and the department not having designated an officer or employee to appear on behalf of the Government.

The Receiver of the United States land office at Missoula made complaint to the department that the interests of the Government required that some attorney appear for it at such hearings. In the early part of 1898 I was directed to proceed to Missoula and represent the Government in these protests. I acted in that capacity in three or four hearings and was then "furloughed for lack of appropriation," and an arrangement was made whereby the United States Attorneys were thereafter to attend such hearings. At these hearings the railroad company would produce from four to six of its regular field employees who testified from field notes alleged to have been made upon the ground at the time of their examination of the lands. The field note books were practically identical and as a result, where lands had been classified as mineral and the railroad company protested, the company was enabled to produce at the hearings the testimony of from four to six witnesses whose testimony went direct to the particular subdivisions in controversy. The Government was without witnesses for the reason that the mineral land classifiers had little or no knowledge of the lands they had classified and could not give detailed descriptions by subdivisions of the various lands included within their classification. I did, however, at the hearings wherein I defended the classification, produce the testimony of many miners who appeared at their own expense.

From personal knowledge gained in attending these hearings and from personal knowledge acquired through six or seven years of field work within the land districts affected by these classifications, I am of the opinion that, (a) The avowed purpose of the act to determine as a present fact the mineral or nonmineral character of so large an area of lands is in the very nature of things impossible; (b) under the terms of the railroad grant the interests of the prospectors and miners conflict with the interests of the Government, and (c) the classification as made does not in truth and in fact determine the mineral or nonmineral character of the lands so classified. As to these propositions I submit the following:

First, Section 3 of the Act of February 26, 1895, provides

"That all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the provision of the United
1253 States Mining Laws, and the commissioners, in making the classification hereinafter provided for, shall take into consideration the mineral discovered or developed on or adjacent to such land and the geological formation of all lands to be examined and classified, all the lands adjacent thereto and the reasonable probabilities of such land containing valuable mineral deposits because of its said formation, location, or character. The classification herein provided for shall be by each legal subdivision where the lands have been surveyed. If the lands examined are not surveyed the classification shall be made by tracts of such extent and designated by such natural or artificial boundaries to identify them as the commissioners may determine. Where mining locations have been heretofore made or patents issued for mining ground in any section of land, this shall be taken as prima facie evidence that the 40-acre subdivision within which it is located is mineral."

From this it will be observed that three men, with little practical knowledge of mining, were required to determine from present known conditions whether a vast area of mountainous country within the mining regions of the United States did or did not contain valuable mineral deposits. In other words, their classification was to foreclose and determine that question which can only be foreclosed and determined in the far future when the science of geologists and the perseverance of prospectors and actual miners shall have demonstrated the extent of our mineral resources.

As to the second proposition it is to the interest of the miners and prospectors that all of the lands within the general mineralized zones in the West should be classified as mineral, and to quote the words of the Revised Statute:

"In all cases lands valuable for minerals shall be reserved from sale except as otherwise expressed and directed by law";

and the classification of these lands within the grant as mineral requires the Government to give agricultural lands in lieu thereof to the railroad company in the indemnity belts.

Immense areas of waste lands, practically untimbered, mountainous, and so far as the knowledge of the mining communities in the West are concerned having no known deposits of mineral, were classified by the Board of Mineral Commissioners as mineral lands. It appearing that the indemnity belts would not furnish lieu lands for the losses so sustained by the railroad company, Congress provided further relief for the company by the Act of July 1, 1898, which, among other things, provided—

1254 "That where prior to January 1, 1898, the whole or any part of an odd-numbered section in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department, and where a purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal and free from valid adverse claim or not occuped by settlers at the time of such selection, situated within any state or territory into which such land grant extends, and patents shall issue for the lands so selected as though it had been originally granted."

The effect of the foregoing was to relieve the indemnity belts of heavy claims originating by reason of settlement or purchase losses within the primary grant, and as a consequence gave the company lieu lands within the indemnity belt for losses occasioned by reason of the mineral classifications made by the mineral land commissioners within its grant.

As to the third proposition that the classification did not in fact determine the mineral or nonmineral character of the land, it is only necessary to refer to the records in the local land offices from which it will appear that thousands of homesteads and timber and stone entries and nonmineral scrip filings have, since the classification, been made upon the lands classified as mineral. It will also appear from such records that in numerous cases the classification as nonmineral covered lands upon which there were valid mining claims, in some instances actual mining operations being carried on at the time the classification was made. It is also a matter of common knowledge, and a fact which may be verified by any disinterested field investigation, that there are hundreds of sections classified as mineral upon which no mineral discovery has ever been made and no mining claim ever located, and by reason of the worthless character of the land no attempt has been made to acquire title thereto under any of the public lands laws.

As I have stated in a memorandum to the Honorable Secretary, it is my opinion that a large percentage of the classification is fraudulent within the definition of "fraud" as given in the case

of Lamb et al. v. Northern Pacific Railroad Company, reported in the 29th Land Decisions, page 102. Whether a wholesale attack should be made upon the classifications and whether an effort should be made to secure a reclassification is another question, in the determination of which the following factors must be taken into consideration:

1255 1st. Many of the lands classified have been patented for more than six years last past and suit to set aside such patent is barred by the Statute of Limitations.

2nd. The Northern Pacific has sold all of its odd numbered sections in Western Montana to the Big Blackfoot Milling Company (one of the Amalgamated Copper's subsidiary corporations), and the Blackfoot will probably be able to establish that it is a bona fide purchaser for value.

3rd. The Northern Pacific has sold all of its odd numbered sections in Idaho to the Weyerhauser people and other lumber companies, and they will likewise probably be able to establish that they are innocent purchasers for value.

4th. I believe a very large percentage of the lands selected by the railroad company, in lieu of those more or less worthless lands classified as mineral within the grant, have been sold and are in the hands of innocent purchasers for value.

5th. An actual inspection of each forty-acre subdivision must necessarily result in finding that immense bodies of land now classified as mineral would have to be (under the terms of the act) classified as non-mineral for the simple reason that there are not now any known deposits of mineral thereon.

6th. The great bulk of the unsurveyed lands were classified as mineral.

7th. In any re-classification the Northern Pacific would under its grant take title to many odd numbered sections containing timber in amounts sufficient to make them now valuable therefor —the same lands not being considered valuable for timber at the time of the classification in view of the timber land markets at that time, and being now classed as mineral.

CONCLUSION

If it is purposed to go into these classifications on an extensive scale I would recommend that all pending classifications not now final be suspended until an actual field examination has been made after the lands have been surveyed; that no further indemnity selections be allowed on a mineral base until the base lands have been examined in the field; and that no additional patents issue to the Northern Pacific Railroad Company or its

grantees for lands claimed under its grant within the Billings, Bozeman, Lewiston, Helena, Missoula and Coeur d'Alene land districts until a field examination of the lands shall have been made or until the Department shall have determined the scope and extent of action to be taken in the premises.

1256 By Mr. LYONS. I offer Northern Pacific Railway Company Exhibit 59, being a report of the "Montana Mining Association," dated February 17, 1908, by a committee of that Association and filed with the Commissioner of the General Land Office March 11, 1908, as an exhibit in a hearing held on that date, found at page 4126 of the Joint Committee Record.

By Mr. MCGOWAN. We object to this on the ground it's irrelevant and immaterial to any defense before the Master at this time, and particularly equitable estoppel.

By the MASTER. The objection will be overruled for the present and the exhibit will be admitted (60).

Northern Pacific Exhibit 59

HELENA, MONTANA,
February 17th, 1908.

To the MONTANA MINING ASSOCIATION,
Helena, Montana.

GENTLEMEN: Your committee appointed to consider and investigate the mineral land classification in the State of Montana by the mineral land commissioners, having investigated the subject so far as able in the brief time allowed, have searched records and considered data so far as available, and beg leave to report as follows:

We find that the men appointed as such commissioners were composed of two classes, viz: men from the Eastern and Southern states of the union who had no knowledge of ores, mines, mineral and mineral lands whatever; and second, men appointed from Montana as supposed mineral land experts, but who were not necessarily experts in mineral knowledge. Each commission was composed of three men. There were three commissions from Montana, and the state was divided into three districts for purposes of classification. One may be called the Bozeman district; one the Helena district; and the third the Missoula district. Each commission usually consisted of one Montana man posing as a mineral expert, and two non-residents of Montana notoriously without qualifications as judges of the mineral character of the lands to be examined and classified.

A third element entered into the make-up of these commissions; it cut a large figure in the work and seemed to be the
1257 chief determining factor in forming the judgments, conclusions and classifications of the several commissions. The element herein alluded to was composed of agents, land attorneys and paid employees of the Northern Pacific Railway Company. These land agents and attorneys of the railway company were always on hand, eating with and working with the commissioners, whether on duty in the field, or at their office work in making reports and arriving at conclusions about classifications. These railway agents were zealous, assiduous, energetic and tireless in their endeavors and efforts to guide, aid, assist, explain, survey, run lines and decide for the Commissioners.

The result of the joint endeavors of the commissioners and railway agents is shown in the classification arrived at, and conclusions reached.

The people of Montana, the State of Montana, the miners and mining interests of the state had no representative or agent attendant upon the commissioners at any time to look after the interests of the miners, the state, or the people, so their interests went by default, while the railway interests were most carefully and satisfactorily adjusted and adjudicated so far as the railway was concerned, however lamentable and injurious to the state, its miners and citizens.

The railway company gained title to a large area of valuable timber land that is unquestionably mineral in character, while at the same time it got rid of thousands of acres of worthless land that was unsalable and devoid of mineral deposits. For all this worthless land it received rich agricultural and profitable timber lands in lieu of the worthless lands surrendered to the government.

As far as your committee has been able to ascertain, the railway company received as the result of this so-called classification, just about what it desired. Of course some of the valuable land classified as mineral by the commissioners, was so clearly mineral and was being mined by such large forces of men, that it had to be classified as mineral, to avert a riot; but wherever there was any doubt, or the way seemed unobstructed, the railway company seems to have had its own way.

By just what methods and manipulations these mineral land commissioners were chosen and appointed to office, your committee is unable to determine, but the result of their work is at hand and open to discussion and comment.

A great many cases concerning the testing of the classification made, are on file in the land offices of the state. After the classi-

fication was completed, the Northern Pacific Railway Company brought many contests against the conclusions reached by the commissions. These contests seem to have been almost unanimously decided against the classification made, and in favor of the railway company, judgment being usually rendered by 1258 default, without contests; no one appeared against the railway company in these cases, and the commissioners evidently did not care to make a contest or to uphold their own conclusions.

Many cases, the records show, where individuals contested the justness of the classification against the railway company, were dismissed for want of prosecution. Many of these cases were probably settled. In others, contestants could not afford the time and expense necessary to such litigation. Other cases were begun and fought through to a conclusion by individuals.

Appended to this report is a list of contests filed in the United States Land Office at Helena, together with action taken and proceedings had, testing the classification made. A number of cases are still pending, awaiting action.

The law passed by Congress in 1895 contained strict provisions and directions as to the method of classification and the rules to be followed in determining the mineral or nonmineral character of the land examined for classification. The instructions of the Department of the Interior to the mineral land commissioners were clear and unmistakable in their terms, and had the statute, the instructions, the rules and regulations been strictly observed and complied with by honest and capable men, uninfluenced and not manipulated by ulterior influences, few mistakes would have been made.

One section of the law reads as follows: "Where mining locations have been heretofore made, or patents issued for mining ground in any section of land, this shall be taken as prima facie evidence that the forty-acre subdivision within which it is located, is mineral land."

The commissioners were required to examine records for mineral locations on lands involved; they were required to go onto and examine each forty-acre tract and ascertain if it was of a mineral character, and to examine adjoining and adjacent land to determine the mineral character of other tracts. In cases of doubt they were to take testimony and seek all available information as to the character of the land examined.

Many or all of these rules, regulations, directions and instructions were ignored by the mineral land commissioners, as is conclusively demonstrated by the evidence and testimony adduced in contested cases. Whole sections and townships of land were

classified as mineral or nonmineral by the commission, without going upon and examining the land at all. This also appears in sworn testimony of contested cases, notably so in the Rowand case, where commissioner J. C. Auld testified under oath that classification had been made by the commission of certain lands when none of the members had ever been within two and a half miles of it.

1259 Your committee can only briefly refer to the testimony and proof of a few notorious cases in this report.

In the case of Lamb vs. N. P. Ry. Co. the classification by the mineral land commissioners in the Bozeman district was directly involved. This case is reported in Vol. 29, Land Decisions, Page 102. The land had been classified as non-mineral and therefore reverted to the railway company; Lamb contested. The evidence adduced, proved that the land was a placer mine, duly located and location recorded. There were six shafts sunk to bedrock, two shafts each 15 feet deep; one shaft 18 feet deep with eight feet drift; one shaft 22 feet; one shaft 25 feet, well timbered with a 24-foot drift; two open cuts each 24 feet long, and several pits. Gold in paying quantities had been taken from the ground. One of the mineral land commissioners had personal knowledge of the mineral character of the land, and before being appointed as commissioner, had tried to obtain a lease and bond on the mine. With all these facts and conditions existing at the time the commissioners made their classification, they decided the land to be non-mineral, and awarded it to the railway company. The decision of the Acting Secretary of the Interior, was that the classification was fraudulent, and Lamb won his case. The decision stated that if the commissioners examined the land at all, in the face of conditions confronting them their classification was fraudulent. If they did not go on the land and examine it, the classification was equally fraudulent.

Your committee is informed that there are two cases pending in Madison County, this State, involving like notorious conditions, the particulars of which we have not yet obtained. These cases are pending before the Department at Washington, involving land clearly mineral in character but classified as non-mineral.

Another case deserving mention is the case of Beveridge vs. N. P. Ry. Co., pending in the Helena Land Office; it involves land in the E.½ of the SE.¼ of sec. 21, T. 3, N. R. 7 W. in the Butte mining district. The claims are the Hercules, Ajax and Achilles. The land was classified as non-mineral by the mineral land commissioners of the Helena district and awarded to the railway company. Patented mineral claims surround this land on all sides, some of the patents interlapping the claims involved, and excluding parts thereof. The Homestake patented lode claim extends

into the Hercules, a quartz and placer patent forms another boundary of the Hercules; three more patented claims join onto it. Nearly three-fourths of the area of the Ajax claim's boundaries, are composed of patented mineral land. The other claim involved, the Achilles, is almost surrounded by quartz and placer patents, while one-third of the land within its boundaries consists of patented mineral land. Yet in the face of this situation, and in spite of all presumption of law, this land, with plenty of mineral indications, was pronounced non-mineral by the mineral land commission. It is also averred that other men have a contract from the Northern Pacific Ry. Co. to sell them the land in dispute, as mineral land, so soon as the contestant, Beveridge, is defeated in his contest.

1260

Another case worthy of more than passing notice is the mineral land now owned by and operated by the Eglanol Mining Company, situated near the mouth of Lincoln Gulch, this county. This land had been located and successfully worked as a placer mine for many years preceding the so-called mineral land classification. It was owned and mined by one James Bowker for over fifteen years. He died several years ago and Dr. O. M. Lanstrum and others, bought it from his administrator for mining purposes. When the purchasers endeavored to obtain patent and perfect their title, they discovered that it was in an odd numbered section, had been classified as nonmineral and awarded to the railway company. They opened negotiations with the Northern Pacific Ry. Co. to purchase the land; the railway company demanded $25.00 to $35.00 per acre for the land; the purchasers then threatened to contest the title and the railway company sold them the land at $5.00 per acre. When this classification was made, according to sworn testimony, the ground was "fairly peppered" with shafts and prospect holes. Another witness said, "There had been dozens of shafts sunk and thousands and thousands of dollars taken out of the ground, and it was covered by filings, and had been steadily worked for mineral during the actual time 'of classification' and we were working it after Bowker's death."

Another significant case has been called to the attention of this committee:

Messrs. A. H. Warren and J. L. Eaton, well known citizens of the City of Helena, located the Golden Eagle quartz lode mining claim to the year 1896, and duly recorded their location notice thereof. The said quartz lode is situated in the SW.¼ of sec. 29, T. 12 N., R. 4 W. not surveyed. The whole of said township 12 was classified as non-mineral by the mineral land commissioners of the Helena district, unknown to the locators, except one patented mining claim therein. At the time the classification was made there was one shaft on the property 120 feet deep on the

vein; another shaft on the property was 70 feet deep, with 65-foot drift, with windlass and dumps, shaft house, and frame dwelling house. There were 5 or 6 tons of shipping ore on the dump. All this work was in plain view. The assessment work had been done each year on the property since its location. Only about one year ago Messrs. Warren and Eaton discovered that the land had been classified as non-mineral by the commission and awarded to the Northern Pacific Railway Co., in the face of the fact that Mr. Warren had personally notified one of the commissioners of the location of the claim and that there was ore sufficient on the dump to determine its mineral character.

1261 The last case to which we will refer specifically is the case of the Northern Pacific Railway Co. v. John A. Rowand. This case was heard before the Helena land office and then sent to the Interior Department at Washington. The decision was in favor of Rowand and against the Northern Pacific Railway Co. by all tribunals. The land in question consisted of three quartz claims that had been duly located, the location duly recorded and the ground mined for many years, even before the date of the land grant made by the United States Government to the Northern Pacific Railway Co. in 1882.

At the time the classification was made the county road ran across the property and over which the mineral land commissioners were driven in broad daylight. There were the following evidences of mining on the property, plainly in sight and most of them near the road:

1. A tunnel 40 feet long, all in ore, with ore dump 25 feet from the road.

2. A tunnel 60 feet long, higher up the hill.

3. A large pit or open working, from which about 200 tons of ore had been mined and milled in an arastra on the ground.

4. An arastra 50 feet from said road, in plain sight.

5. Alongside of the road were pulleys, machinery, lumber, and square timbers for the building of a second arastra, the framework for which was then erected and standing not more than 25 feet from the road.

6. Men were then engaged in drifting from the bottom of an 18-foot shaft, placer mining and washing gravel on the land in question at the very time the commissioners claim to have been on the land making their pretended examination and classification thereof, and the tailings from this placer working, together with the water from the sluice boxes, extended over the county road over which the commissioners drove to such an extent that the miners were obliged by the district road supervisor to build another road around this dump

7. These miners were then living in a cabin near the road in plain sight therefrom.

Notwithstanding the above facts, the mineral land commissioners state under oath in their report on the classification of this land that they "classified it as nonmineral for the reason that there were no indications of mineral, and no mining being done on it."

The evidence in this case is quite voluminous and is accessible to any member of this convention who may desire to review it. This evidence further shows that on their way to the Rowand land the commissioners present classified several sections of land and did not go within 2 miles of any of it or make any examination of it at all. Such classification was worthless, against the law and regulations, a violation of the official oaths of the commissioners, and fraudulent. The decision of the local land office and of the acting commissioner of the General Land Office at Washington was that the classification of the Rowand land
1262 was fraudulent, and he has since received patent for the claims.

Some correspondence was introduced into the testimony for Rowand between Thomas Cooper, land agent of the Northern Pacific Railway Co., and John R. Toole, president of the Big Blackfoot Milling Co. The land in question was heavily timbered and had been sold under contract by the railway company to the lumber company; the gist of the whole correspondence is contained in one letter from said Cooper, in substance as follows:

"Please expedite the settlement of this Rowand matter as speedily as possible as I am apprehensive as to the effect an investigation might have on the other classifications of mineral land."

The testimony also shows some rank differences of statements of facts under oath between Commissioners Auld and Cavanaugh; they made diametrically opposite statements as to material matters of fact, to put it mildly. The testimony further shows that shrewd land agents and land attorneys of the Northern Pacific Railway Co. were present "aiding," "assisting," and abetting the mineral land commissioners in classifying the Rowand land, and were present at the hearing to swear the railroad's case through to a successful end.

From the information gained by your committee in the brief time allotted, from the examination made of the cases on trial and pending, involving the mineral land classification in this state, and from the matters and facts herein set forth, the members of this committee unhesitatingly declare as their firm belief that the mineral land classification made in Montana, is absurd,

worthless, and fraught with injury and injustice to the miners, prospectors, mining interests, and the people of the State in general; that it is tainted with fraud and collusion, and was largely manipulated by the Northern Pacific Ry. Co. and its paid agents and attorneys; that large tracts of land, subdivisions of sections, sections and townships of land were classified without being visited or examined; that the law, rules, and regulations prescribed for such classification were often disregarded, ignored, and disobeyed; that the Northern Pacific Ry. Co. having already gobbled up a large part of the priceless timber lands of Montana, is in a fair way to grasp and hold a large portion of the valuable mineral lands of the state by means of this collusive and fraudulent classification, unless the same be nullified and set aside; that immediate and drastic remedies should be applied to save the mineral lands to the people; that unless effective action be promptly taken by way of remedial proceedings, that hundreds of miners now expending their time and labor in developing their mining claims in fancied security, will before long, or when they apply for patent, wake up to the fact that the title to their land rests in the Northern Pacific Ry. Co., acquired by means of this negligent, inefficient, and fraudulent classification.

1263 We therefore recommend that suitable resolutions be drafted and adopted by this convention, laying this matter before the President of the United States, the Secretary of the Interior, and both houses of Congress, so as to secure a thorough and exhaustive investigation of the mineral land classification of this state, to secure another and an honest and just classification and segregation of the mineral lands of Montana, and to restore, as far as possible, to the people, the lands already filched from them.

Respectfully submitted.

(Signed) JOHN A. ROWAND, *Chairman*,
CHARLES W. HALMICK,
F. L. SIZER,
JOHN BERKIN,
A. C. RAY (absent from State),
Committee on investigation of Mineral Land classification.

(Attached to this letter is a list entitled "Appeals from Classification of Land Grant of Northern Pacific Railroad Company.)

By Mr. LYONS. I offer Northern Pacific Exhibit 60, "Senate Substitute for House Concurrent Resolution No. 6," addressed to the Senate and House of Representatives in Congress, approved March 4, 1909—(appearing at page 384 of the Session Laws of the State of Montana, 11th Session, year 1909), and I ask to be permitted to substitute a copy in place of the book (60).

By Mr. McGowan. I have no objection to the substitution, but would like to have the same admitted, subject to the same objections as heretofore made.

Northern Pacific exhibit 60

SENATE SUBSTITUTE FOR HOUSE CONCURRENT RESOLUTION No. 6

To the honorable Senate and House of Representatives in Congress assembled:

1264 Whereas a bill was passed by Congress providing for the classification of the mineral lands in the Northern Pacific land grant, and where a classification was pretended to be made by certain officials known as mineral land commissioners; and

Whereas investigation of the work of such mineral land commissioners by special field officials of the Interior Department discloses the fact that said former so-called mineral land classification was unscientific, worthless, and made without full knowledge of the lands within the Northern Pacific land grant, and to the detriment of the Government and public; and

Whereas such investigation has shown such pretended classification to be inaccurate and devoid of merit; and

Whereas as a result of an investigation by the Interior Department of less than 50 per cent of the complaints so far made nearly 20,000 acres of mineral land has been restored to the Government; and

Whereas a proper and just classification of the mineral land of Montana is of vital interest to the miners and prospectors of the State and involves mineral lands of untold millions of value: Now, therefore, be it

Resolved by the Legislative Assembly of the State of Montana, the Senate concurring, That we humbly petition and request of the National Congress that it pass an act providing for a just, honest, and thorough mineral reclassification of all lands of the State of Montana within the Northern Pacific land grant.

Approved March 4, 1909.

By Mr. LYONS. I offer Northern Pacific Railway Company Exhibit 61, being a certified copy of the Report of D. D. Mitchell, Superintendent of Indian Affairs, dated November 11, 1851, relative to the Fort Laramie Treaty, appearing at page 1910 of the Joint Committee record.

By Mr. McGowan. I have no objection (61).

Northern Pacific exhibit 61.

OFFICE SUPERINTENDENT INDIAN AFFAIRS,
St. Louis, November 11, 1851.

SIR: I have the honor herewith to transmit a treaty concluded at Fort Laramie, between myself and Agent Fitzpatrick, commissioners on the part of the United States, and the following tribes or nations of the prairie and mountain Indians, viz, Sioux or Dahcotahs, Assenaboins, Arickeras, Gros Ventres, Crows, Cheyennes, and Arrapahoes.

1265 In order to assemble the various, and widely scattered tribes at some suitable point, I dispatched expresses up the Missouri, Arkansas, and Platte Rivers, early in the spring, with such letters and instructions as I deemed best calculated to insure the attendance of the Indians. The point designated by me for holding the council was Fort Laramie, and the time fixed for the 1st of September.

I left St. Louis on the 24th of July, and reached Fort Laramie on the 31st of August, where I found the above-named tribes assembled, and impatiently expecting my arrival. Up to this time, the different tribes had no intercourse with each other, and had remained encamped on both sides of the river some distance apart. I at once called as many of the principal men together as could speedily be assembled, and explained the objects of the proposed treaty. On this occasion I succeeded in prevailing upon them to agree upon a place that should be occupied as a general camping ground during the pendency of the council; this was done with less difficulty than I anticipated, considering the number of conflicting interests among the whites, and the jealousies and prejudices among the Indians, that had to be reconciled.

We were 18 days encamped together, during which time the Indians conducted themselves in a manner that excited the admiration and surprise of every one. The different tribes although hereditary enemies, interchanged daily visits, both in their national and individual capacities; smoked and feasted together; exchanged presents, adopted each others' children according to their own customs, and done all that was held sacred or solemn in the eyes of these Indians, to prove the sincerity of their peaceful and friendly intentions—both amongst themselves, and with the citizens of the United States, lawfully residing among them, or passing through the country.

The most important provisions in the accompanying treaty I consider to be the following: First. The right acknowledged and granted on the part of the Indians to the United States to establish roads, military and other posts, throughout the Indian

country, so far as they claim or exercise ownership over it. Second. The solemn obligations they have entered into to maintain peaceful relations among themselves and to abstain from all depredations upon the whites passing through the country, and to make restitution for any damage or loss that a white man shall sustain by the acts of their people. Third. The settling up of all former complaints on the part of the Indians for the destruction of their buffalo, timber, grass, etc., caused by the passing of the whites through their country; the presents received at the time were considered as full payment. Fourth. The promised annuity of $50,000 for 50 years, to be delivered in such articles as their changing condition may from time to time require. As this is the only article in the treaty that will cost money to the Government, I will briefly state the reasons by which I was influenced, and the good results which I believe it will ultimately produce.

1266 Fifty thousand dollars for a limited period of years is a small amount to be distributed among at least 50,000 Indians, especially when we consider that we have taken, or are rapidly taking away from them all means of support, by what may be considered a partial occupancy of their soil. On the score of economy, to say nothing of justice or humanity, I believe that amount will be well expended. In the opinions of the best informed persons (who had an opportunity of judging) it will in all probability save the country from the ruinous and useless expenses of a war against the prairie tribes, which would cost many millions, and be productive of nothing but increased feelings of hostility on the part of the Indians, and annoyances and vexation to the Government. The lessons of experience taught us during the Florida war, and which are now being taught us by the Indian wars in New Mexico, all admonish us of the necessity of avoiding Indian wars, if possible. Humanity calls loudly for some interposition on the part of the American Government to save if possible some portion of these ill-fated tribes, and this it is thought can only be done by furnishing them with the means and gradually turning their attention to agricultural pursuits. Without some aid from the Government it will be impossible for them to make an attempt even as graziers. Fifty years, it was thought, would be time sufficient to give the experiment a fair trial, and solve the great problem whether or not an Indian can be made a civilized man.

The laying off of the country into geographical or rather national domains I regard as a very important measure, inasmuch as it will take away a great cause of quarrel among themselves and at the same time enable the Government to ascertain

who are the depredators should depredations be hereafter committed. The accompanying map, upon which these national boundaries are clearly marked and defined, was made in the presence of the Indians and fully approved and sanctioned by all. As a map of reference it will be of great service to the Department.

Viewing the treaty in all its provisions, I am clearly of opinion that it is the best that could have been made for both parties. I am moreover of the opinion that it will be as faithfully observed and carried out in as good faith on the part of the Indians as it will on the part of the United States and the white people thereof. There was an earnest solemnity and a deep conviction of the necessity of adopting some such measures, evident in the conduct and manners of the Indians throughout the whole council. On leaving for their respective homes and bidding each other adieu they gave the strongest possible evidence of their friendly intentions for the future and the mutual confidence and good faith which they had in each other. Invitations were freely given and as freely accepted by each of the tribes to interchange visits, talks, and smoke together like brothers upon ground where they had never before met but for the purpose of scalping each other. This, to my mind, was conclusive evidence of the sincerity of the Indians, and nothing but bad management or some untoward misfortune can ever break it.

1267 Respectfully, your obedient servant.

D. D. MITCHELL,
Superintendent of Indian Affairs.

Hon. L. LEA, *Commissioner of Indian Affairs.*

NORTHERN PACIFIC EXHIBIT 62

(This exhibit, received in evidence over the general objection as to relevancy and materiality to any thing before the Master and the further ground that the acceptance of the road by the Commission and approval by the President did not operate as an estoppel, is certified copy of Executive Order of October 7, 1884. Said Executive Order is printed on page 2965 of Joint Committee Record. It consists of a letter, dated October 1, 1884, signed by H. M. Teller, Secretary of the Interior, addressed to the President, and states that he submits herewith report of Mr. A. N. Cole and two others, Commissioners appointed to examine a section of 25 miles of Northern Pacific Railroad, beginning at a point in the City of Tacoma, running southeasterly and ending at a point near South Prairie; that the Commissioners report said section as constructed in substantial com-

pliance with law and instructions of the Department. The Secretary recommends that said section be accepted but that no patents for lands coterminous with said section issue until specific orders so to do were given by the President. On the back of said paper is a notation "Executive Mansion, October 7, 1884, Approved, Chester A. Arthur") (61).

NORTHERN PACIFIC EXHIBIT 63

(This exhibit, received in evidence over the same objection as to previous exhibits, is certified copy of Executive Order
1268 of December 9, 1884, printed pages 2965–2966 of Joint Committee Record. Said exhibit consists of a letter, dated December 8, 1884, signed by M. L. Joslyn, Acting Secretary of the Interior, addressed to the President. The contents are similar to those of Northern Pacific Exhibit 62. It states that a report of Commissioners is being submitted, who have examined 37 miles of railroad and telegraph line in Washington Territory, and a similar recommendation is made. On the back of the paper is endorsement "Executive Mansion, December 9, 1884, The within recommendations are approved, Chester A. Arthur") (62).

NORTHERN PACIFIC EXHIBIT 64

(This exhibit, received in evidence over the same objection as made to previous exhibits, is certified copy of Executive Order of January 17, 1885, printed page 2966 of the Joint Committee Record. Said executive document consists of a letter signed by M. L. Joslyn, Acting Secretary, addressed to the President, submitting a report of Commissioners appointed to examine a section of 25 miles beginning at a point in Yakima Valley, about one mile south of Satass Creek, and running northwesterly to a point in Yakima Valley, about one mile north of Yakima City. A recommendation similar to that contained in the two previous exhibits is made. On the back of said paper was an endorsement by President Arthur similar to the endorsement appearing on Northern Pacific Exhibit 63) (62).

NORTHERN PACIFIC EXHIBIT 65

(This exhibit, received in evidence over the same objection as made to preceding exhibits, is a certified copy of an Exec-
1269 utive Order of February 6, 1885, printed at pages 2966–2967, Joint Committee Record. This exhibit consists of a letter, dated February 6, 1885, signed by H. M. Teller, Secretary of the Interior, addressed to the President, submitting report of Commissioners appointed to examine a section of 37½ miles of

railroad and telegraph line in Wisconsin, beginning near the town of Ashland, and running westerly to a point in Sec. 13, T. 47 N., R. 10 W. A recommendation similar to that contained in the preceding exhibits is made. On the back of said paper appears an endorsement approving the recommendations and signed by President Arthur) (62).

NORTHERN PACIFIC EXHIBIT 66

(This exhibit, received in evidence over the same objection as made to preceding exhibits, is certified copy of an Executive Order, dated March 2, 1885, printed page 2967, Joint Committee Record. This exhibit consists of a letter, dated March 2, 1885, signed by H. M. Teller, Secretary, and addressed to the President. The letter states that in communications of dates, October 7 and December 9, 1884, and January 17 and February 6, 1885, with reports of Commissioners, the Secretary had inserted the suggestion to withhold issuance of patents; that Congress had pending before it bills proposing to forfeit the grant to said Railroad Company; that it had adjourned without any action on said bills; and that the Secretary recommends the restriction as to issuing of patents be withdrawn. On the back of said paper is an endorsement approving the recommendation of the Secretary, signed by President Arthur) (63).

1270 NORTHERN PACIFIC EXHIBIT 67

(This exhibit, received in evidence, is a certified copy of the decree filed August 8, 1896, of the Circuit Court of the United States, Eastern District of Wisconsin, in the foreclosure suit, confirming the several reports of Special Master Alfred L. Cary of the sale of lands and rights in respect of lands. It recites that by the reports of said Special Master it appeared that he had fully complied with the directions in the decrees as to the sale of the lands and rights in respect of lands; that the purchaser, Northern Pacific Railway Company, was highest and best bidder; and that the same were struck off at the several sales thereof to said purchaser. That said purchaser had made the payments thus far obligatory upon it and delivered over to the Special Master bonds secured by mortgages of the Railroad Company as stated in detail. It was adjudged that the several reports of the Special Master were approved and sales by him made to said Northern Pacific Railway Company of the patented lands and lands selected and certified and other lands and rights in respect of lands were approved and confirmed and made absolute. Provision is contained in said decree for deeds by said

Special Master, by The Farmers Loan and Trust Company of New York, as Trustee under the mortgages foreclosed, by the Receivers, and by Northern Pacific Railroad Company) (66).

1271 CHARLES W. BUNN was called as a witness on behalf of the defendants (67):

I am Vice President and Special Counsel of the Railway Company. I commenced my connection with the Railway Company about September 1, 1896, as General Counsel, which position I have held until five or six years ago. Most of the time I have also been Vice President. I was one of the counsel in St. Paul for the Receivers for about 15 months prior to September 1, 1896. I attended the sales of Northern Pacific lands made by Special Master Alfred L. Cary in the 1896 foreclosure proceedings, except at Superior, and possibly Portland. At Mandan, at Missoula, at Rathdrum, and at Seattle I went to the various courthouses and heard the proceedings and gave attention to the sale.

All of the sales were attended by Francis Lynde Stetson, of New York, counsel for the reorganization managers and General Counsel of the Northern Pacific Railway Company in New York. William Nelson Cromwell of the firm of Sullivan & Cromwell was present. Victor Morawetz, who was advising Mr. Stetson in these foreclosures, attended the Wisconsin sale. Mr. Alfred F. Burleigh, Counsel for the Washington Receivers, and Mr. Underwood, for the Montana Receivers, were there. Usually we had local attorneys at the various places (67–68).

Mr. Winter, President of the Company, attended all the sales and did the bidding. C. H. Coster of J. P. Morgan & Company and Edward D. Adams, Chairman of the Reorganization Committee, attended the sales. These men and Mr. Cary are dead. Mr. Stetson, Mr. Cromwell and myself pursued these sales to see that the law was complied with, and we took special
1272 notice as to whether the property was sold in parcels according to the decree of the Court. At Missoula, as at every other sale, the Master first announced that he would offer the lands for sale in separate parcels and receive any bid for any separate parcel that anybody chose to make. There were a few bids made by people other than the Northern Pacific Railway Company. One or two were made at Missoula. After the Master had received those bids, Mr. Winter, the President of the Railway Company, outbid the individuals who offered bids on those special parcels. After that there were no other bids except those of the Railway Company. The land was sold in separate parcels for a fixed price per parcel to the Railway Company. The price per parcel and method of sale are correctly stated in

Alfred L. Cary's report to the Circuit Court of the United States. By "fixed price" I mean that Mr. Winter would offer $100 per parcel for a whole lot of parcels.

Since September 1, 1896, I have acted as counsel for the Northern Pacific Railroad Company. It had no property during that time and did no business, simply kept up an organization. The Railway Company kept up that organization as a holder of all the stock. Annual meetings were held, records kept, and officers elected for the Railroad Company. As counsel for the Railway Company, I attended to all of the legal business of the Railroad Company, simply because it was to the interest of the Railway Company to keep that organization intact for whatever possibilities might arise (69–71).

CROSS-EXAMINATION

As Mr. Winter's attorney I can say his purpose undoubtedly was to get the property for the Railway Company
1273 if he could. The payment was made in greater part in bonds and to a certain extent in cash, as the court provided in its decree it might be. The Railway Company then held nearly all the bonds on the mortgage being foreclosed. I think Mr. Winter outbid every outside bidder. There were some outside bids made. I remember one or two at Missoula, and I think one or two at Mandan and Seattle. Mr. Winter put in opposing bids and won out. He made the highest bid and after that the sale proceeded very rapidly at so much per parcel.

A. Mr. Winter, bidding for the Railroad Company, was bidding in bonds, bidding partly in bonds, as I understand.

Q. Let me explain the question—as against cash, presumably, from the outside?

A. Yes; just as anybody else at a foreclosure sale who doesn't have the debt.

I never heard of any limitation on the amount Mr. Winter might bid. He was vested with complete authority and was accompanied by his legal advisers (77–79).

F. C. SHAROOD was called as a witness on behalf of the defendants (85):

I am Assistant Special Auditor of the Northern Pacific Railway Company, and have been in its employ since January 1, 1920. Prior to that time I was an examiner and accountant in the Interstate Commerce Commission.

NORTHERN PACIFIC EXHIBIT 68

(This exhibit, received in evidence over the objection that it was incompetent, irrelevant and immaterial and that the fran-

chise, the act of July 2, 1864, contemplated deductions for
1274 transportation, freight and mail, is a statement showing the deductions made by the United States in connection with freight, passenger and mail transportation from 1876 until December 31, 1931. No freight and passenger deductions for the years 1877 to 1882, inclusive, are shown for the reason that records of those years were destroyed by an occurrence in the record room in St. Paul some years ago (87). Said exhibit is summarized as follows:

	Freight and passenger	Mail	Total
Northern Pacific Railroad Company for the period covering the year ended June 30, 1877, to August 1896	$1, 238, 215. 81	$1, 143, 481. 46	$2, 381, 697. 27
Northern Pacific Railway Company for the period covering the year ended August 31, 1897, to December 31, 1929	9, 238, 937. 25	5, 759, 556. 84	14, 998, 494. 09
	10, 477, 153. 06	6, 903, 038. 30	17, 380, 191. 36
Year ended December 31, 1930	213, 012. 35	262, 964. 83	475, 977. 18
Year ended December 31, 1931	229, 536. 38	234, 743. 23	464, 279. 61
	10, 919, 701. 79	7, 400, 746. 36	18, 320, 448. 15

By the WITNESS. It is my understanding the nongrant railroads meet our rates for carrying mail (87).

NORTHERN PACIFIC EXHIBIT 69

(This exhibit, received in evidence, is copy of voucher made in August, 1882, in the sum of $25,000.00, in favor of
1275 the United States, under Act of Congress of July 10, 1882, for the benefit of the Crow Indians, based upon acquiring of right of way through Crow Indian Reservation) (90).

NORTHERN PACIFIC EXHIBIT 70

(This exhibit, received in evidence over the objection that it is incompetent, irrelevant, and immaterial, is a voucher pursuant to Act of Congress of March 3, 1893, for $8,295.80, payable to the Treasurer of United States as compensation for right of way of the Northern Pacific Railroad Company through the Yakima Indian Reservation. The voucher is dated March 22, 1893, and was made by the Railroad Company) (91).

By the witness (testifying over the objection that the testimony was irrelevant, incompetent, and immaterial, that the rights of the trustees cannot be superior to those of the Railway Company under the decision of the Supreme Court in the Oregon & California case, and that bonds issued under the refunding and improvement mortgage are not involved in the land grant):

Prior Lien bonds outstanding in the hands of the public on July 31, 1931, were in the face amount of $107,330,000, and General Lien bonds then outstanding were in the face amount of $54,551,500. On the same date, bonds of the Refunding and Improvement Mortgage outstanding were $145,661,900 face amount (91–94).

The O. R. & N. Railway was built into Wallula from Umatilla in 1880 (97).

G. T. C. PETERSON was called as a witness on behalf of defendants (99):

I am Chief Clerk in the Law Department of the Northern Pacific Railway Company, and have been in the department since 1920. I have the original contract, marked "Northern Pacific Railway Exhibit 71," between the Oregon Railway & Navigation Company and the Northern Pacific Railroad Company,
1276 relative to business between Wallula and Portland

Over the objection that the exhibit was incompetent, irrelevant and immaterial in connection with defenses at the time before the Master, said Exhibit 71 was received in evidence.

NORTHERN PACIFIC EXHIBIT 71

(This exhibit is a copy of the above-described contract. The contract stated that the Northern Pacific was constructing its main line from Wallula to Lake Pend d'Oreille, Idaho, "and intends to continue the construction of said main line down the valley of the Columbia River," and that it desired to use the railroad of the Oregon Company being constructed from Wallula to Portland to carry its traffic west from Wallula until the completion of the main line of the Northern Pacific from Wallula via the Columbia River to the City of the Dalles, and until a railroad connection at the Dalles should be made between the main line of the Northern Pacific and the railroad being constructed by the Oregon Company. The contract provided that when the main line of the Northern Pacific from Wallula to a point opposite the City of the Dalles and a connecting railroad therefrom to the railroad of the Oregon Company near the City of the Dalles should be completed, the exchange of traffic should cease to be made at Wallula, and that the Northern Pacific should have the use of the Oregon road from the Dalles to Portland. It provided that when the Northern Pacific should complete a through line of transportation of its own from Wallula to Portland, then the right to use the railroad of the Oregon Company should cease. This agreement further provided that
1277 it should not be construed to prevent the Northern Pacific from constructing its main line from the Dalles via the valley of the Columbia River to Kalama, Washington, nor from

constructing its branch railroad over the Cascades to Puget Sound) (101).

By the WITNESS. I am in charge of the dockets and records of the Law Department and made an examination of the dockets to ascertain whether any suit ever was brought by the United States upon any of the matters complained of in Subdivisions 6 to 17, inclusive, of the amended and supplemental answer of the Railway Company. I found no record of such a suit. I made a similar search to ascertain if any suit ever was brought by the United States questioning the succession in interest of the Northern Pacific Railway Company to the Northern Pacific Railroad Company.

By Mr. MCGOWAN. We object on the ground that the testimony is irrelevant, incompetent and immaterial, and the fact that no suit has heretofore been brought has nothing to do with any matter before the Master.

By the WITNESS. I could not find a record of any such suit (102–103).

1281 JOHN M. HUGHES was called as a witness on behalf of the defendants (106):

DIRECT EXAMINATION

My place of residence is Hudson, Wisconsin. I am Land Commissioner, Northern Pacific Railway Company. I have been connected with the company thirty-six years, all of that time in the Land Department (106).

I have the sales record for Section 5, T. 15 N., R. 22 W., Montana, and the contract of sale for said land. Said section was sold November 15, 1897. It was included in a contract of sale covering 27,004.38 acres. The contract does not state a separate consideration for the various transactions. The total consideration stated in the contract is $77,379.00. The report of the Chief Timber Cruiser, addressed to Land Commissioner Phipps, stated that on said Section 5 there were 5,775,000 feet of marketable saw log timber (107–113).

NORTHERN PACIFIC EXHIBIT 74

(This exhibit, received in evidence over the objection that it was incompetent, irrelevant, and immaterial, and that laches and estoppel do not constitute a defense, is a copy of the above described contract for the sale of 27,004.38 acres to A. B. Hammond) (112).

NORTHERN PACIFIC EXHIBIT 75

(This exhibit, received in evidence over the same objection as made to the preceding exhibit, is a schedule of descriptions of land situated in various States within the place and indemnity limits of the land grant purchased by and conveyed to the
1282 United States by the defendants, Railroad Company, Railway Company, or Northwestern Improvement Company (115). It shows that 10,721,286 acres in the States of Minnesota, North Dakota, Montana, Wyoming, Washington, and Oregon, were purchased for a consideration of $66,198.93, and that 3,644.84 acres in Minnesota were acquired by condemnation proceedings for a consideration of $2,034.40. It also contains a list of 305.10 acres offered to the United States and being withheld from other disposition, pending appropriation of funds applicable to such purchases; 1,309.20 acres for which the United States had an option but purchase was not sanctioned by the Attorney General during the pendency of litigation over the land grant; and 1,684.56 acres leased to the United States for the term ending June 30, 1933, with option to purchase.)

By the WITNESS. I have prepared Northern Pacific Railway Company Exhibit 76, which is a compilation of the acreage patented to the Railroad Company and the Railway Company by years. The last patent issued to the Railroad Company was dated January 6, 1900, and the first patent issued to the Railway Company was dated April 14, 1900, there being no patents between those two dates.

Over the objection that laches and estoppel are not defenses in this action, said Northern Pacific Exhibit 76 was received in evidence.

By the WITNESS. Approximately 5,000,000 acres of land were patented to the Railroad Company or Railway Company after the opinion of February 6, 1897 of Attorney General Harmon and up to the date of Attorney General Moody's opinion of April 12, 1905 (115–119).

NORTHERN PACIFIC EXHIBIT 77

(This exhibit, received in evidence over the objection
1283 that it is incompetent, irrelevant, and immaterial, and has no connection with laches or equitable estoppel, is a copy of deed dated January 12, 1897, made by Alfred L. Cary, Special Master, to the Northern Pacific Railway Company, conveying 175,636.63 acres patented to the Railroad Company between August 18, 1896, and October 22, 1896) (126).

NORTHERN PACIFIC EXHIBIT 78

(This exhibit, received in evidence over the same objection made to Exhibit 77, is a copy of a deed dated March 2, 1899, made by Alfred L. Cary, Special Master, to the Northern Pacific Railway Company, conveying 964,785.28 acres patented to the Railroad Company between October 23, 1896, and December 31, 1898.)

NORTHERN PACIFIC EXHIBIT 79

(This exhibit, received in evidence over the same objection made to Exhibit 77, is a copy of a deed dated April 6, 1900, from Alfred L. Cary, Special Master, to the Northern Pacific Railway Company, conveying 892,256.68 acres patented to the Railroad Company between February 7, 1899, and January 6, 1900) (127).

By the WITNESS. I am familiar with the transaction commonly referred to as the "Garfield Agreement." I have an original communication from the Commissioner of the General Land Office, Mr. Dennett, to Britton & Gray, dated April 23, 1910 (Northern Pacific Exhibit 80). Britton & Gray were resident counsel for the Northern Pacific Railway Company in Washington, D. C., principally, I think, with the Land Department and land matters before the Interior Department in the Gen-
1284 eral Land Office. Their salary was paid by my department.

I was well acquainted with two of the members of the firm. I never knew the original member, Alec T. Britton. I knew A. B. Browne and Alec Britton, Jr. They are all dead.

By Mr. LYONS. I offer in evidence Northern Pacific Railway Company Exhibit No. 80.

By Mr. MCGOWAN. We make no objection on the ground it's not an original, but we do object on the ground it's irrelevant and immaterial in connection with any defense of laches and equitable estoppel; that it covers but a limited portion of the lands classified by the Commissioner and is directed more particularly to specific private contests without taking in the broader aspect of the fraudulent character of the mineral classification.

By the MASTER. I will admit it subject to your objection (127–129).

NORTHERN PACIFIC EXHIBIT 80

This exhibit is a letter from Mr. Fred Dennett, Commissioner of the General Land Office, to Britton & Gray, counsel for the Northern Pacific Railway Company, Washington, D. C., dated April 23, 1910. This letter, at upper right-hand corner, bears the initials L. L. S. It is quoted and summarized as follows:

As resident counsel for the Northern Pacific Railway Company, you have, in person and by letters to this office, urged action upon the investigation by the field force of the office, and upon several propositions of settlement offered by you, and by other representatives of the company, in the matter of the classification of certain lands in the state of Montana, embraced within the primary limits of grants to said company, as well as in certain indemnity selections.

That a full understanding of the entire subject matter may be arrived at, it is deemed proper to briefly review the history of the case, as shown by the records of the Department and this office, and the legislation affecting the same, with a view to
1285 making clear the conditions giving rise to the investigation in the first instance and the action this office concludes is proper in the premises.

The letter refers to the Act of July 2, 1864, and the provision that mineral lands are excluded from the grant and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands may be selected, and quotes from the Joint Resolution of May 31, 1870. The letter then proceeds to enumerate and review the following matters:

The Act of February 26, 1895 (28 Stat. 685), which provided for the mineral classification.

The fact that since the Act, the company filed lists and selections of lands in the western part of Montana classified as nonmineral of which some have been patented.

That the attention of the Land Office was first called to alleged fraudulent classifications of lands in Montana by report from L. L. Sharp, Chief of Field Division, Helena, Montana, dated February 18, 1908, referring to charges appearing in an article written by an attorney at Helena, Montana, appearing in the Pacific Coast Monthly for January 1908, and to charges by the Montana Mining Association and recommending that all patents now yet issued by suspended pending investigation.

On March 3, 1908, the Montana Mining Association, a volunteer organization of men having mining interest in Montana, issued credentials to John A. Rowand, O. M. Lanstrum, and Fred Whiteside to call upon the President of the United States, and the Secretary of the Interior, in the matter of this classification.

This commission called upon former Secretary Garfield, and upon me, and presented their complaint. The particular and specific complaints, made by the commissioners, in their representative capacity, was that large areas of land in Montana, which were mineral in fact, were by the mineral commissioners reported to this office as nonmineral and subsequently the title thereto passed to the Northern Pacific Railway Company.

1286 That after report by the Land Office to the Secretary the following order was issued:

I have the honor to recommend that all pending classifications of lands within the grant to the Northern Pacific railway company in Helena, Bozeman, and Missoula, Montana, and Coeur d'Alene, Idaho, land districts, under the Act of February 26, 1895; all indemnity selections based upon mineral classifications under said act, and the issuance of patent to the Northern Pacific railway company for any lands within its grant or based thereon within the land districts named, as established on February 26, 1895, excepting on selection, under Act of March 2, 1899 (30 Stats., 993), be suspended.

(Signed) FRED DENNETT,
Commissioner.

Approved March 13, 1908.

(Signed) JAMES RUDOLPH GARFIELD,
Secretary.

That on July 7, 1908, this order was modified to relieve from its operation the selections of the company pending upon a mineral base loss.

That on June 27, 1908 instructions were given to Sharp, Chief of Field Division, to cause an investigation to be made of certain lands classified as nonmineral by the mineral classifiers under the Act of February 26, 1895; reports have been received from him and his agents and action has been taken by the Land Office as to some of these lands.

Under date of January 13, 1909, Mr. Thomas Cooper, Land Commissioner for the Northern Pacific Railway Company, addressed a letter to the Department in which reference was made to a conference that was held by himself and former Secretary Garfield, and he states as his understanding of the result of that conference the following:

1. That the Department will urge upon Congress that it either repeal the mineral classification act of February 26, 1895, or extend its time and make sufficient appropriation to complete the classification.

1287 2. That the Department will approve the recommendation of the Commissioner of the General Land Office setting aside the mineral classification of lands in the St. Joe district, Idaho.

3. The company will consent to the Department setting aside the nonmineral classification of so much of the 19,120 acres referred to in a memorandum attached to said letter, as may be unsold by it, and will reconvey to the United States such of the area as has been patented to it in order to revest the United

States with jurisdiction, such lands to be considered never having been classified under the act of February 26, 1895.

4. That the General Land Office will advise the company prior to February 15, 1909, of any additional lands against which complaints have been made of their erroneous classification, and which complaints the Land Office find to have been well founded. The company consents to the same procedure being followed out as to such lands as is provided for in respect to the 19,120 acres referred to in the third provision, above.

5. The company may prior to February 15, 1909, file with the General Land Office, a list of lands which it believes to have been erroneously classified as mineral, and if its complaint is, upon examination by the land office, held to be well founded, the mineral classification of such lands will be set aside, thus placing them in the same category of unclassified lands, provided, however, that the area of said lands should not exceed the area of lands heretofore classified as nonmineral as to which the nonmineral classification is to be set aside under this understanding.

6. That as to all other lands in the mineral classification districts, which have been classified as nonmineral, and are now ready for patenting to the company, if no complaints of erroneous classifications have been made to the Department, or if such complaints have been made and the examination by the Department shows them to be without foundation, such lands are to be patented to the company without further delay.

The letter of Commissioner Dennett (Northern Pacific Exhibit 80) then comments at length upon previous correspondence with the Land Commissioner and counsel for the Railway Company referring to specific parcels of land, some of which were claimed by the Railway Company to have been erroneously classified as mineral and concerning certain lands alleged by the De-
1288 partment to have been fraudulently classified in that the land was of known mineral character at the time the classification was made. Attention was called to the fact that directions were given to institute suit to cancel the patent as to some of the lands last mentioned. The exhibit further reviews earlier correspondence with the Railway Company with reference to a possible discontinuance of the suit to cancel patent and then states:

It appears proper at this point to consider the questions raised by the company's land commissioner in his letter to the Department of January 13, 1909, viz: the conference held by former Secretary Garfield and representatives of the company, and the effect of the understanding then reached. It appears that a conference between the parties named was in fact held, and the substance of the agreement reached was as follows:

1. The company to consent to the setting aside of the nonmineral classification of so much of the lands in Montana alleged to be mineral as have not been transferred by the company to innocent purchasers for value, and to reconvey to the United States the tracts patented, the agreement to relate not only to the land then alleged to be mineral (19,120 acres) but to other lands thereafter found to be mineral.

2. The company to submit a list of lands classed as mineral which it believed to be in fact nonmineral, and this classification to be set aside by the Land Department if the company's allegation be well founded, the area, however, not to exceed that described above (in item one).

3. The Secretary of the Interior to approve the commissioner's recommendation and the Idaho mineral classification to be set aside.

4. The Department to endeavor to secure an appropriation to complete the classification.

5. As to land classified as nonmineral against which no protest or objection was made, the company to have patents.

As to the Idaho classification, above referred to, it is shown that, on March 3, 1909, former Secretary Garfield vacated the same, and as to that it may now be dismissed from consideration.

Referring to certain correspondence with respect to the lands conveyed by the company to one Breen and to the Blackfoot Milling Company and the possibility of reconveyance of
1289 the lands referred to on account of the question arising as to whether the purchasers are innocent purchasers for value, the writer of the letter after expressing the opinion that the parties in question are not innocent purchasers for value of lands mineral in fact because of the mineral reservation contained in the contract to sell, continues:

* * * by your letter of November 19, 1909, you submit on behalf of the Northern Pacific railway company the following proposition:

In lieu of the deeds now on file embracing Secs. 27 and 35, T. 6 N., R. 15 W., Montana, the company will quit-claim the same land to the United States in a new deed, in which the preamble will show:

"1. That the lands are within the place limits of the company's grant and opposite constructed road;

"2. That they were classified as nonmineral under Act of February 26, 1895;

"3. That they were patented to the company;

"4. That the Department questioned the regularity and correctness of the nonmineral classification, and that, therefore, in consideration of the dismissal by the United States of its present

proceedings to have the patents set aside, and of its agreement to again examine the land with a view of determining its mineral or nonmineral character, and to again patent the lands to the company should such examination show the land to be nonmineral in fact, the company quit-claims the land to the United States."

* * * * * * * *

This office has, in communications heretofore addressed to you, given a description of lands involved in office investigations in the state of Montana, but in order that the company may be in a position to take proper action upon the questions raised by this letter, it is deemed proper to here give a description of all the lands reported by the field force of this office, affected by the questions under consideration: (Then follows descriptions of lands under headings "Lands Reported Adversely" and "Lands against which the Statute of Limitations has run.")

The position of the office in this matter is as follows:
1290 It is the purpose to adhere to the terms of the agreement entered into by former Secretary Garfield and representatives of the company, the understanding of that agreement being, as expressed on pages 16 and 17 of this letter. If, therefore, the company will submit new deeds of the form indicated in your letter of November 19, 1909, together with abstracts of title showing title still to reside in the company, recommendation will be made to the Attorney General for the dismissal of the suit now pending, as it affects the lands embraced in said deeds. As to the lands involved in the company's contract with Breen, consideration is invited to the opinion, of the office, as herein expressed, with regard to his status, viz, that it is not that of a purchaser for value without notice, and particularly as to the suggestion herein advanced with reference to the reconveyance by him to the company, so that, if a satisfactory arrangement is made, the office will be in a position to recommend the dismissal of the pending suit respecting all of the lands therein involved.

With regard to the lands adversely reported upon by agents of this office, as to which it is claimed deeds have been given to, or contracts to convey have been made with, the Blackfoot Milling Company, and against which suits have not yet been instituted, you are asked to consider the view held by the office as to its status, as herein expressed, and also what arrangement, if any, has been made with said company for the reconveyance of lands deeded to it or embraced in contracts to convey.

You are also requested to examine the descriptions of the lands herein given, and invited to submit deeds as to patented lands

or consents to waiver of nonmineral classifications as to pending lists and selections, in accordance with the terms of the agreement referred to, if it is the desire of the company so to do.

You are further informed that this office, on receipt of favorable reports from special agents as to lands involved in this controversy, is taking up the same for action as soon as received, and the lands reported on are properly clear-listed to the appropriate division of the office.)

By the WITNESS. In 1908 and 1909 I was Chief Clerk to the Land Commissioner and commencing January 1, 1910, I was promoted to the official position as Eastern Land Agent and Land Commissioner's First Assistant on all matters pertaining to land grant adjustments, as well as sales. During that period Mr. Thomas Cooper was Land Commissioner. He had charge
1291 of the Right of Way Department as well as the Land Department. I think I am correct in saying at that time he took over the job of assistant to the President. I was in particular charge of the work of the land department during that period.

Exhibit 80, page 7, states that under date of January 13, 1909, Mr. Thomas Cooper, Land Commissioner of the Northern Pacific Railway Company, addressed a letter to the Department in which reference was made to a conference held by himself with former Secretary Garfield. Northern Pacific Exhibit 81 is the office copy of Mr. Cooper's letter to the Secretary of the Interior dated January 13, 1909.

By Mr. LYONS. I offer in evidence Northern Pacific Railway Company Exhibit No. 81.

By Mr. MCGOWAN. I make the same objection, and for the further reason this letter purports to be Mr. Cooper's interpretation of what took place before the Secretary.

By the MASTER. It may go in as part of the whole story (129–131).

NORTHERN PACIFIC EXHIBIT 81

This exhibit is a certified copy of letter from Thomas Cooper, Land Commissioner, Northern Pacific Railway Company, addressed to the Secretary of the Interior, written at Washington, D. C., dated January 13, 1909, as follows:

Referring to the attached memorandum of conference between the Commissioner of the General Land Office and the undersigned, as representing the Northern Pacific Railway Company, relative to the mineral and nonmineral classification of lands under the Act of February 26, 1895, within the limits of the Northern Pacific grant, I understand the result of the conference this day held between us to be as follows:

1292 The letter then lists six items which are not included here because they are set out in full in the preceding exhibit, Number 80, immediately following the reference to Mr. Cooper's letter of January 13, 1909. The following memorandum is attached to the letter:

MEMORANDUM

Of conference held in the office of the Commissioner of the General Land Office January 12, 1909, in regard to the Mineral Classification of the Northern Pacific Railway Company's land grant.

Present: Commissioner Bennett; Chief Special Agent Swartz; Land Commissioner Cooper, and Attorney Britton.

CLASSIFIED AREA

The quantity estimated by the Company of lands that have not yet been classified as to their mineral or nonmineral character under the Act of February 26, 1895, is 225,663.61 acres.

The Act provides that no lands can be patented to the company within the district described therein until classified; the time prescribed in the Act within which the classification must be completed has expired; therefore, either the Act should be repealed, so as to permit of the adjustment of these unclassified lands and the issuance of patents to the company, or it should be extended as to time and an appropriation made for the completion of the classification work. The present situation is an injustice to the company.

MINERAL CLASSIFICATION IN ST. JOE DISTRICT, IDAHO

This case is now pending before the Secretary, upon the recommendation of the Commissioner that the classification be set aside on the ground that the Mineral Commissioners did not make proper examination of the lands. If the recommendation of the Commissioner is approved, and it is the company's desire that such be done, these lands would be placed in the category of unclassified lands to be classified hereafter with the 225,663.61 acres referred to above, upon which no classification has ever been made. In support of the contention that these lands were never properly classified, the company recently filed a statement with the Commissioner, showing that in the seven townships that have been surveyed in the District, 152 filings have been made on the even-numbered sections under the homestead, timber
1293 and stone, and other laws applying to nonmineral lands, and not a single mineral entry appears on the records, indicating the erroneous assumption that all of the lands in this District are mineral in character.

COMPLAINTS AS TO ERRONEOUS CLASSIFICATION

It has been notorious in Montana for nearly a year past that complaints were being received by the General Land Office of errors in the classification, and presumably all errors known to exist have been called to the attention of the Government officials. The officials of the General Land Office have investigated a large number of these complaints, and have reported the following lands to have been erroneously classified as nonmineral:

All of Township 12 North, Range 4 West;

E/2 SE/4, Sec. 29; NW/4; N/2 SW/4; W/2 SE/4 and SE/4 SE/4, Sec. 33, T. 12 North, Range 14 West.

NW/4 SE/4, Sec. 1, T. 9 North, Range 7 West.

SE/4, Sec. 17, T. 12 North, R. 15 West;

All of Sec. 27, T. 12 North, Range 16 West;

E/2 SW/4, Sec. 21, T. 3 North, Range 7 West.

Secs. 9, 15, 17, 19, 21, 23, 27, 29, 31, 33, 35 T. 31 North, Range 30 West.

All in the State of Montana.

The Company has not been officially advised by the Commissioner of the General Land Office as to the nature of the complaints against the nonmineral classification of the above-described lands, nor as to detailed reports of the Land Office agents, excepting as to Township 12 North, Range 4 West.

In order that the present conditions resulting in a suspension of all action within the mineral classification districts may be relieved, the following suggestions are submitted as a basis for agreement between the Secretary and the Company.

SUGGESTIONS

1. That the Secretary will urge upon Congress that it either repeal the mineral classification act or extend its time and make sufficient appropriation to complete the work.

1294 2. That the Secretary approve the recommendation of the Commissioner setting aside the classification of the lands in the St. Joe District.

3. The Company will consent to the nonmineral classification being set aside by the Secretary on so much of the 19,120 acres above referred to as may be unsold by it, and will reconvey to the United States such of the area as has been patented, in order to revest the department with jurisdiction; these lands will then be considered as never having been classified as to their mineral or nonmineral character.

4. The department has not completed examination of all of the lands against which complaints were made of erroneous

classification, but expects to complete its work within a short time. The company will consent to the same procedure being followed as outlined in the preceding paragraph as to any lands that may be examined by the department prior to June 30, next, and found by it to be erroneously classified.

5. If the company elects to present to the department on or before June 30, next, a list of lands which it believes to have been erroneously classified as mineral, the Secretary will set aside the classification of said lands, thus placing them in the category of unclassified lands provided, however, that the area of said lands shall not exceed the area of the lands classified as nonmineral, to which the classification is to be set aside under this agreement.

6. That as to lands in the mineral classification districts that have been classified as nonmineral, and are ready for patent to the Company, if no complaints of erroneous classification have been made to the Department, or if such complaints have been made and the examination by the Department shows them unfounded, they be patented without further delay.)

By the WITNESS. I have the office copy of the letter dated January 19, 1909, referred to on page 8 of Exhibit No. 80, being an unsigned letter from Thomas Cooper to the Commissioner of the General Land Office, Northern Pacific Exhibit 82.

By Mr. LYONS. We offer this as a copy.

By Mr. MCGOWAN. We make the same objection.

By the MASTER. It will be admitted subject to your objection (131–132).

1295 NORTHERN PACIFIC EXHIBIT 82

This exhibit is an unsigned letter from Thomas Cooper, Land Commissioner of the Northern Pacific Railway Company, to the Commissioner of the General Land Office, dated January 19, 1909, and is as follows:

Referring to my letter of the 13th instant to the Secretary, on the Mineral Classification matter, and the conference at which you were present at which the same was discussed and agreed upon, I beg to advise you that since my return to St. Paul I have investigated the status of the lands referred to in paragraph 3 of said letter, being the lands examined by your Department and found to be erroneously classified as nonmineral, and enclose a memorandum showing the same.

You will observe that 2,920 acres in township 31 north, range 30 west, Montana, were classified and approved as mineral, a fact which your office appears to have overlooked; therefore, so far as these lands are concerned, no further action is necessary.

The next item on the memorandum is the SE¼ of SE¼ of section 17, township 12 north, range 15 west, which was classified as mineral but the classification has not been approved; all that is necessary is for the Secretary to approve the mineral classification and that item will be disposed of.

The next following item is 12,800 acres of unsurveyed lands which the company has not sold, and which were classified and approved as nonmineral. In accordance with my letter of the 13th instant above referred to, the company consents that the classification on these lands be set aside.

The next following item is 96.65 acres of surveyed lands not yet patented to the company and not sold by it, and which were classified and approved as nonmineral. In accordance with my letter of the 13th instant, the company consents that the classification be set aside.

The next following item is 400 acres patented to the company, unsold, but classified and approved as nonmineral. The company will reconvey this land to the United States for the purpose of reinvesting it with jurisdiction in order that the Secretary may set aside the classification.

The next following item is 3,128.53 acres patented to the company, classified and approved as nonmineral, but which the company has contracted to sell to the Big Blackfoot Milling Company. Following this is an item of 360 acres of lands classified and approved as nonmineral and not yet patented to the company, but contracted to be sold to the Big Blackfoot Milling Company. These make a total of 3,488.53 acres classified
1296 and approved as nonmineral, but which the company has contracted to sell to the Big Blackfoot Milling Company. I have explained the situation to the Big Blackfoot Milling Company and have asked them to consent to the elimination of these lands from their contract, and if such consent is given, we will then reconvey to the United States the lands which have been patented, in order to vest it with jurisdiction for the purpose of setting aside the classification, and will at the same time consent to the classification being set aside on the 360 acres unpatented.

The next following tract, being Lots 1 and 2 in section 21, township 3 north, range 7 west, was classified and approved as nonmineral, patented to the company, and sold and conveyed by it to Thomas Hilling by quitclaim deed dated January 28, 1886. We do not believe it is possible for the company to secure a reconveyance of this tract because of the lapse of time since the conveyance was made. I have investigated the company's records in regard to this transaction, and all I can find is a letter

from J. L. Corbett, with a sketch attached, of both of which I attach copies. These papers indicate that Mr. Hilling had a house upon the land, which was doubtless the reason the company sold it to him, and because of the uncertainty as to whether the company would be able to perfect title the conveyance, it will be observed, was made by quitclaim deed. It will also be noted that the consideration received by the company for the land was $154.50, being at the rate of $1.50 per acre. For the reason stated it may as well be concluded that the company will be unable to reconvey this land to the United States, and that the only remedy of the United States, if it choose to exercise it, will be to bring suit to set aside the patent on the ground of fraud in the classification.

The foregoing takes up all of the items in the list furnished us by the Department of lands which they had examined and found to be erroneously classified, but in addition there is the item of section 13 in township 3 south, range 5 east, classified and approved as non-mineral, patented to the company, and which is unsold. The mineral character of this tract was called to the attention of the Department by the Forest Service, and we will reconvey it to the United States in order to re-invest it with jurisdiction so that the classification may be set aside.

I enclose an instrument executed under the seal of the company consenting that the classification be set aside on certain of the lands as referred to above; the descriptions in this instrument being as follows:

	Sec.	Twp. N.	Rge. W.
All	1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 & 35	12	4
All	9	31	30
All	17	31	30
NW¼SE¼ (Lot 8)	1	9	7
NW¼SE¼, SE¼SE¼	33	12	14
E½NE¼	19	31	30
W½	21	31	30
		S.	E.
All	13	3	5

1297 I also enclose an executed deed reconveying to the United States the lands above referred to; classified and approved as nonmineral, patented to the company, and which are unsold, and which reconveyance is made for the purpose of vesting jurisdiction in the Department so that the classification can be set aside as agreed upon; the descriptions in this instrument are as follows:

	Sec.	Twp.	Rge.
		N.	W.
E½NE¼	19	31	30
W½	21	31	30
		S.	E.
All	13	3	5

In due course I will advise you of the decision of the Big Blackfoot Milling Company in regard to the lands which we have contracted to sell it.

Yours truly,

Land Commissioner.

TC–H.

Enclosures.)

By the WITNESS. I was familiar in a general way with these transactions during this period. I have the office copy of a memorandum from Mr. Cooper dated April 21, ..., advising me of the situation and telling me what to do (Northern Pacific Exhibit 83). I was unable to find the original. I am familiar enough with the substance of the memorandum so that I could say whether it is substantially a correct copy. The matters referred to in that memorandum so far as they had to be carried out by the Northern Pacific were taken care of by the proper officers.

By Mr. LYONS. We offer Northern Pacific Railway Company Exhibit 83.

By Mr. MCGOWAN. We have no objection.

Whereupon Northern Pacific Exhibit 83 was admitted in evidence (132–134).

1298 *Northern Pacific Exhibit 83*

ST. PAUL, MINN., *April 21, 1909.*

J. M. H.

The mineral classification matter was discussed at a conference in the Secretary's office held Friday, 16th instant. Present Secretary Ballinger, Commissioner Bennett, Chief Special Agent Schwartz, Senators Carter and Dixon, Messrs. Elliott, Britton and Cooper.

It was agreed that the arrangement made with Secretary Garfield will be continued for the present, that is to say, the company consents to setting aside the classification of any lands which the investigations of the Department show to have been erroneously classified, where the lands have not been sold, and where the lands have been sold it will try and get the consent

of the parties to whom it sold the lands to the company reconveying them to the United States. The company will be permitted to present a list of an equal area of lands outside of Forest Reserves where the mistakes were made against it, excepting that if any of the lands which it consents be re-classified lie in Forest Reserves then to the same extent the company may present a list of lands in Forest Reserves to have the mineral classification set aside. Mr. Britton will advise the Department that because of having sold some of the lands the company is unable to comply with the demand made by the Department for reconveyance, and the United States in order to prevent the statute running will bring suit to set aside the patent; it is understood that the suit will not be pressed until full opportunity is given the company to get the consent of the parties to whom it sold the lands to a reconveyance.

The Department will ask for an appropriation to complete the classification work, and the Senators, who now understand the situation, will assist in securing the same.

T. C.

TC-H.

By the WITNESS. I have a copy of the letter from the Secretary of the Interior to the Commissioner of the General Land Office dated February 14, 1911 (Northern Pacific Exhibit 84).

By Mr. MCGOWAN. We make the same objection, although we have no objection to the copy.

Whereupon Northern Pacific Exhibit 84 was admitted in evidence (134–135).

1299 *Northern Pacific Exhibit 84*

DEPARTMENT OF THE INTERIOR,
Washington, D. C., February 14, 1911.

HONORABLE COMMISSIONER OF THE GENERAL LAND OFFICE,

SIR: I am in receipt of your letter of September 19, 1910, referring to the fact that on March 13, 1908, upon the recommendation of the Commissioner of the General Land Office, the Secretary suspended all pending classifications of lands, indemnity selections and selection lists of the Northern Pacific Railway Company in Helena, Bozeman, Missoula and Coeur d'Alene land districts, within the territory affected by the Act of February 26, 1895. This action was as you state, taken pending an investigation as to complaints regarding the classification and subsequently a verbal agreement appears to have been reached between the Railway Company and the Secretary of the Interior, to the effect that the Company would re-convey to the United States

land patented to it, alleged to be mineral and which have not been transferred to innocent purchasers for value; that the Company would submit a list of lands classified as mineral, which it believed in fact nonmineral; this classification to be investigated and reversed by the Land Department if found to be erroneous, the area not to exceed the amount of the mineral lands reconveyed by the Company; the Department to set aside certain mineral classifications in Idaho pending further investigation; to endeavor to secure an appropriation for completing the classification and to take up for examination and patent to the Company, lands within the grant classified as nonmineral and against which no protest or objection has been made.

You state that the Company has complied with paragraph 1 of the agreement by conveying lands alleged to be mineral and have waived the classification of such unpatented lands as have been found mineral and that the matter is pending in your office awaiting filing of evidence of the release of a mortgage as to tracts reconveyed. The Company has submitted a list of land classified as mineral which it alleges to be nonmineral. The Idaho Classification referred to was set aside March 3, 1909. By Act of June 25, 1910, Congress made an appropriation for the purpose of completing the classification. The Company now requests that its pending selection lists for tracts classified as nonmineral, against which no protest or objection has been made be taken up for adjudication and you recommend that the said suspension of March 13, 1908, be revoked and the lists adjudicated.

It appears that the object of the suspension has been ac-
1300 complished and that compliance has been had by the Company with the terms of the verbal agreement, entered into between it and my predecessor with the exception of the release of the mortgage hereinbefore mentioned.

Accordingly you are authorized to take up for adjudication the pending selection lists for tracts which have been finally classified as non-mineral and against which no protest or objection has so far been urged, cause a field examination of the lands to be made and thereafter in the light of the record and of the report submitted as a result of the field investigation, adjudicate the lists after the filing of the Company of evidence of the release of the mortgage in question.

Very respectfully,

R. C. BALLINGER,
Secretary.

By the WITNESS. I have a tabulation prepared showing the carrying out of this so-called Garfield Agreement. It is Northern Pacific Exhibit 85. It is labeled "Final Results Obtained in

connection with Classification of Land under the Agreement between Secretary of the Interior Garfield & Thomas Cooper, Land Commissioner, N. P. Ry. Co., January 13, 1909." That compilation correctly shows the facts in regard to lands classified and reclassified. It has been taken from the Land Department of the Northern Pacific Railway Company and according to my best judgment and belief is correct.

By Mr. LYONS. I offer this in evidence.

By Mr. MCGOWAN. The same objection.

By the MASTER. It will be admitted (135–136).

1301 *Northern Pacific Exhibit 85*

FINAL RESULTS OBTAINED IN CONNECTION WITH CLASSIFICATION OF LAND UNDER THE AGREEMENT BETWEEN SECRETARY OF INTERIOR GARFIELD & THOMAS COOPER, LAND COMMISSIONER, N. P. RY. CO., JANUARY 13, 1909

	Acres
Area classified as nonmineral claimed to be mineral in character	33,854.55
Area classified as mineral claimed by company to be nonmineral in character	33,921.71
Total in both classifications	67,776.26
Reclassified by U. S. Geological Survey and approved by the Secretary with following results:	
Classified mineral	13,080.49
Classified nonmineral	54,695.77
Total in both classifications	67,776.26
Of the area claimed by the Government to have been erroneously classified nonmineral, the U. S. Geological Survey reclassified as mineral	10,243.80
And as nonmineral	23,610.75
	33,854.55
Of the area claimed by the Company to have been erroneously classified mineral, the U. S. Geological Survey reclassified as mineral	2,836.69
And as nonmineral	31,085.02
	33,921.71

By the WITNESS. In this correspondence it is shown that Mr. Cooper suggested all of this work be done by February 15, 1909. That date was disregarded. It was carried along indefinitely.

CROSS-EXAMINATION OF MR. HUGHES

I grew up with the Garfield Agreement. It was a matter of very common discussion and consideration in the St. Paul office,

with Mr. Cooper and his legal advisers, and I was present at many occasions when the matter was under discussion. The correspondence all passed through my hands so I
1302 have a familiarity with it at that time. Secretary Ballinger in one of his communications that has been put in here calls it a verbal agreement. So far as the Northern Pacific is concerned it was written as set up in Mr. Cooper's letter of January 13, 1909, addressed to the Secretary. That was his understanding of it. The Garfield Agreement started because of the complaints that were filed with the General Land Office by these Montana mining people that certain lands had been classified as nonmineral which they felt had been classified wrongfully, and were in fact mineral in character. Perhaps the matter goes back further than that, but the immediate thing that brought the Garfield Agreement up was this petition of the Montana Mining Association which resulted in, I might say, an embargo by the Secretary of the Interior of patents in the mineral district. I don't know as I am competent to say what representations Mr. John Rowand and Mr. Fred Lanstrum made when they appeared in Washington. They are represented as a committee appointed by a Montana Mining Association to take the matter up with the proper Government officers. I wouldn't be competent to say what showing they made. As a result of the Garfield Agreement some of the lands previously classified as nonmineral and approved by the Secretary of the Interior were reclassified. I am not competent to say what kind of a showing Rowand and Lanstrum made, but the genesis of it, I believe, is that the Garfield Agreement grew out of the conference they had in Washington. My Exhibit 85 covers all the lands under the Garfield Agreement. Some of the lands were not changed under the reclassification. They were classified the same as the original classification.

1303 Following the Garfield Agreement, of the area claimed by the Government to have been erroneously classified nonmineral, the Geological Survey reclassified as mineral, 10,243.80, and of the area claimed by the company to have been erroneously classified mineral, the Survey reclassified as mineral, 2,836.69, a total of approximately 13,000 acres (138–141).

I have no recollection that the relationship of Messrs. Crane and Goode under the timber contracts with the Northern Pacific Railway Company was ever introduced into the discussion in the negotiations in connection with the Garfield Agreement. I don't know whether it was or not. I have the complete files here with reference to the Garfield Agreement. I have been through the files many times but have never discovered that the Crane and Goode contracts were referred to in it.

Q. Have you made an examination of the files with reference to the passes issued to the examiners by the Northern Pacific Railway Company at that time?

By Mr. CANNON. I doubt if that is before the Master at this time.

By the MASTER. Let him answer it.

By Mr. CANNON. To make a full investigation of this bunch of papers will require some time.

By the MASTER. Out of session you go through those papers carefully with those two things in mind, namely, free transportation, and the contract with Crane & Goode that has been referred to (142–143).

By the WITNESS. I am not thoroughly familiar with the case known as the St. Joe classification. I know of it. I don't know the quantity. It was sizable. I don't know whether the Railway Company brought what might be called charges before
1304 the Interior Department in which they said the classification had been fraudulent. I wouldn't say. I don't remember the run of that case. I have some recollection there was some such statement made by the Railway Company that the mineral commissioners had not been upon the ground, that they classified it in the wintertime when there was snow on the ground and they couldn't see the land, but I am very foggy on it. As I say, I don't handle those things and I don't know much about it (144–145).

In the negotiations in connection with the Garfield Agreement reference was made to the St. Joe classification. As to anything being said in the negotiations in connection with the participation by the Northern Pacific in the original St. Joe classification, I wasn't present at the negotiations in Washington. I don't know what has been said. There is certainly nothing in this correspondence I have produced here which indicates anything of that nature. I think I know the reasons that prompted the Railway Company to agree to the reclassification of the lands that had been classified and approved by the Secretary of the Interior. A very serious situation was developing because of these complaints that were made in Montana. The political aspects of the situation commenced to come in and it was thought advisable on the part of the land commissioner to see if it wasn't possible to clear up the matter in a way to settle everybody's difficulties, and straighten it all out, and that was the prime purpose of it. It was a matter of political expediency and getting rid of the contests and difficulties growing out of it (146–147).

I have made an examination of the papers requested yesterday. I found no reference whatever to the Crane &
1305 Goode contract in these files and papers, no reference whatever to the classification of the mineral commission (151).

I am familiar with the document appearing on page 3321 of the Joint Committee hearings, furnished to the Committee by Mr. Kerr, counsel for the Northern Pacific, made out in our office, and which is correct so far as I know, which shows that in the States of Montana and Idaho, 3,807,045.80 acres were classified as mineral, up to December 31, 1921. On page 3322 is a continuation of that tabulation which shows that for the lands classified as mineral the company has been indemnified for losses to the extent of 1,391,655.33 acres. The tabulation shows further that the unindemnified mineral losses were 2,415,390.47 (153–155).

REDIRECT EXAMINATION

Q. You say you find nothing in the files that you have here about the issuance of free transportation to the Mineral Land Commissioners—I will ask you if, being chief clerk in the Land Department, you have some knowledge of the issuance of those passes?

A. Yes, I have.

By Mr. LYONS. If it is at all important I can ask him about this—if the Master wants to hear it.

By the MASTER. Perhaps now is as good a time as any to make this suggestion to counsel, and counsel can see what I have on my mind.

Now, under the defenses you are making, Mr. Lyons, you are undertaking to say that supposing the allegations of the bill are true in respect to this mineral classification, with all
1306 reasonable inferences that can be drawn from the facts there alleged, nevertheless the Government has no case (156).

By Mr. LYONS. Has failed to state a cause of action.

By the MASTER. Now, for instance, under the allegations of the free transportation—it alleges that the employees of the railroad accompanied the commissioners; it alleges the Crane-Goode contract—now, all of these facts may have been done with a fraudulent purpose by the railroad company, or, if not originally done with a fraudulent purpose by the railroad company, may have been used fraudulently. In the event it may have been used without any purpose of fraud in the minds of anybody to unduly influence the Commissioners, that, of course, I take it would be constructive fraud. On the other hand, these things

may have been done perfectly innocently. I take it that, perhaps, it may be said the employees going with the Commissioners may have been for the purpose of assisting them in pointing out corners, and so on, and the inference from the bare naked fact might as well be one as the other—so I should say of the Crane-Goode contract, and when it comes to passes all of that may be explained—not only is it the custom but all Government officials have passes, still I can't help but feel there is a presumption in this case of the improper use of the transportation, and that it was given for an improper purpose; nevertheless not only must the facts alleged by the Government be deemed to be true, but all inferences which might be drawn from them, in favor of the Government and against you, and, therefore, I don't see any necessity at all of going into the facts at the present time.

By Mr. LYONS. You have to plead fraud before you can prove it.

1307 By the MASTER. Oh, yes; I know.

By Mr. LYONS. I wanted to be sure you got my thought.

By the MASTER. I got your thought precisely, and when I read over the allegations of the bill the thought occurred to me it was a kind of alleged plea of fraud, but in determining what it was and its effect I would say I would have to take not only the facts but all the inferences that might properly be drawn from it one way or the other, therefore, the conclusion I am coming to is I don't see any necessity of going into this pass question on question of fraud here at all—it's assumed whatever is alleged is true for the purpose of this motion.

By Mr. LYONS. I said that at the beginning at New York and at Washington—and it's still my opinion that all well-pleaded facts are admitted, but here is this suggestion that we are trying to conceal something—that we haven't produced the record and I am trying to put before the Master everything we have or know about the passes since counsel insists upon it. I don't think it makes the slightest difference—it's admitted.

By the MASTER. I don't think it makes the slightest difference in this hearing—I don't think you would be heard to prove they were properly issued or he be heard to prove they were improperly issued—therefore, I think the pass question is wholly immaterial.

By Mr. LYONS. I withdraw the question.

By Mr. MCGOWAN. May I say a word—the witness on Mr. Lyons' examination said all of these matters were considered by the Interior Department under the Garfield agreement—all considered and passed on—what we tried to bring out from this

witness is that some of these facts had nothing to do with the Garfield agreement at all.

1308 By the MASTER. Well, the Garfield agreement speaks for itself. I permitted you, and I think you are strictly within your rights, to show the land involved in the mineral classification, because the Garfield agreement is now shown here, and it now appears they were a very small part of the total (157–159).

LOUIS L. SCHWARM was called as a witness on behalf of the defendants (160):

DIRECT EXAMINATION

My place of residence is St. Paul, Minnesota. I have been General Adjustment Agent of the Northern Pacific Land Department since August 1923. I have been in the land department since October, 1908 (160).

Northern Pacific Exhibit 97 is a schedule by years of areas patented to the Northern Pacific Railway Company in lieu of mineral losses subsequent to the report of H. H. Schwartz, Chief of Field Division, General Land Office, dated March 12, 1908, and shows a total area of 512,178.07 acres. It is correctly made up.

By Mr. LYONS. We offer in evidence Exhibit 97.

Whereupon, there being no objection, defendant Railway Company's Exhibit 97 was admitted in evidence.

NORTHERN PACIFIC EXHIBIT 97

This exhibit is a schedule as described by the witness. It shows areas patented for the years 1908 to 1910, inclusive, 1913 to 1919, inclusive, 1921, 1923, 1924, and 1927, totaling 512,178.07 acres.

By the WITNESS. Northern Pacific Exhibit 98 is a schedule under the Acts of June 22, 1874, July 1, 1898, May 17, 1906,

1309 February 28, 1919, December 15, 1921, and February 28, 1923, of areas patented to the Northern Pacific Railway Company subsequent to the report of H. H. Schwartz, Chief of Field Division, G. L. O., dated March 12, 1908, in lieu of lands selected on mineral losses, showing a total of 181,327.37 acres. It is true and correct (173).

By Mr. LYONS. We offer Exhibit No. 98 in evidence.

By the WITNESS. The phrase "in lieu of lands selected" means the Railway Company would select any land within the indemnity limits of its grant in lieu of the tract of land within the place limits of its grant which was classified and adjudged to be mineral in character. We probably had a contest with a settler as to the indemnity tract, and we would relinquish claim to that

tract under the provisions of one of the relief acts. After relinquishment of that land we would select another tract of land under the provisions of the relief act and get a patent.

By Mr. McGOWAN. We object to this on the ground it is incompetent, irrelevant and immaterial in connection with any of the matters pending before the Master at this time, and for the additional reason there is no relationship between these acts referred to in the tabulation and the Schwartz report which refers to the mineral classification.

By the MASTER. It will be admitted (174).

NORTHERN PACIFIC EXHIBIT 98

This exhibit is a schedule entitled "Schedule by Years of Areas Patented to the Northern Pacific Railway Company under the Acts of June 22, 1874, July 1, 1898, May 17, 1906, February 28, 1919, December 15, 1921, and February 28, 1923, subsequent 1310 to report of H. H. Schwartz, Chief of Field Division, General Land Office, dated March 12, 1908, in lieu of lands selected on Mineral Losses." It shows areas patented for the years 1908 to 1924, inclusive, 1929 and 1930, totaling 181,327.37 acres.

By the WITNESS. Northern Pacific Exhibit 99 is a photographic copy of Father DeSmet's map on file in the library of Congress in Washington, D. C.

By Mr. LYONS. There is at page 1922 of the Joint Committee Record, a copy of this map. I am satisfied it is an accurate copy, introduced by the Government.

Whereupon there being no objection, defendant Railway Company's Exhibit 99 was admitted in evidence (175).

NORTHERN PACIFIC EXHIBIT 99

This exhibit is a photographic copy of a map bearing the inscription "Respectfully Presented To Col. D. D. Mitchell by P. T. DeSmet, Soc. Jes. 1851." It shows area marked "Indian Territory"; area bearing the names "Pawnees," "Ponkas," "Omahas," "Otoes," "Iowas" and "Kickapoos"; areas marked "Arapahas & Cheyennes Territory"; "Sioux or Dacotah Territory"; "Mandan, Grosventre & Arriccara Territory"; "Crow Territory"; "Assiniboin Territory"; "Blackfoot Territory"; "Selish Flathead Upper Pendoreille or Kalispel Territory"; areas bearing the names "Skalsi or Koetenay"; "Stietshoi or Pointed Heart"; "Lower Pendoreille Indians"; "Shoyetpe or Kettle Fall Inds."; "Okinaganes Inds."; "Zinegomene or Spokane Indians" and "Spokane & Nez Percè"; "Zinpoilish or Isle de Pierre Inds.";

area bearing the name "Walla Wallas," "Waillalpi Cayuses," "Punashli or Bonacks," "Shoshones or Snake," and "Nez Perce or Sapelans"; and area bearing the name "Utah Indians."
1311 This exhibit is impractical of inclusion in a printed record and will be certified in its original form pursuant to 28 U. S. C. A. § 863 and Supreme Court Rule 10 (4).

By the WITNESS. Northern Pacific Exhibit 100 is a map showing the location of the territory of the Sissiton and Warpeton Indians as defined in the Treaty of February 19, 1867, Article 2, ratified May 2, 1867. It also shows the location of the land involved in the case of Buttz v. Northern Pacific Railway Company, 119 U. S. 55.

By Mr. LYONS. I will say this exhibit is introduced purely for convenience in discussing the Buttz case, on which the defendant largely relies, and which will be argued and discussed to a very considerable extent, and I wish to introduce it for that purpose alone.

Whereupon there being no objection, defendant Railway Company's Exhibit 100 was admitted in evidence (175–176).

NORTHERN PACIFIC EXHIBIT 100

This exhibit is a map on which there is an area marked "Territory of the Sissiton and Warpeton Indians as defined in Article—2 of the Treaty of February 19, 1867. Ratified May 2, 1867." It covers areas in North and South Dakota. An arrow points to a section on the map and the notation appears: "Location of Sec. 7–139N.–48W. No. Dak. involved in Buttz vs. N. P. R. R. Co., 119 U. S. 55." This exhibit is impractical of inclusion in a printed record and will be certified in its original form.

By the WITNESS. Northern Pacific Exhibit 101 is a map of the United States showing the location as outlined in green of the territory of the Sissiton and Warpeton Indians as defined
1312 in Article 2 of the Treaty of February 19, 1867, and, also, outlined in black, the territory of the Mandan, Crow, Assiniboin, Blackfoot, Sioux, and Arrapaho, as defined in the Fort Laramie Treaty of September 17, 1851. I merely superimposed upon this geographical map of the United States the territory included in the Fort Laramie treaty. The territory of the Sissiton, Warpeton, and Sioux is the same territory as shown on Exhibit 100 (176).

By Mr. LYONS. I will say this map is introduced merely for convenience in discussing the Buttz case.

Whereupon there being no objection, defendant Railway Company's Exhibit 101 was admitted in evidence (177).

NORTHERN PACIFIC EXHIBIT 101

(This exhibit is a map entitled "Geographically Correct Map of the United States of America Shewing Lines of the Northern Pacific Railway." It designates an area outlined in green as "Territory of the Sisseton and Warpeton Indians Article 2—Treaty of February 19, 1867." It shows areas outlined in black as "Blackfoot Territory," "Assinaboin Territory," "Mandan-Gros Ventre & Arrickaras Territory," "Crow Territory," "Sioux or Dahcotah Territory," and "Arapahos & Cheyennes Territory." These areas are designated "Territory defined in Fort Laramie Treaty of September 17, 1851." This exhibit is impractical of inclusion in a printed record and will be certified in its original form.)

By the WITNESS. Northern Pacific Exhibit 102 is a map of the States of North and South Dakota, Nebraska, Montana, and Wyoming, on which has been shown in green, in purple, and
1313 in pink the limits of the Mandan, Gros Ventre, and Arricara Territory as designated in the Fort Laramie Treaty of September 17, 1851. These maps and the location of the Indian territories were taken from Royce's book, the 18th Annual Report of the Bureau of American Ethnology for the years 1896 and 1897, compiled by Charles G. Royce. The States of North Dakota and Montana were taken exactly from Royce, but the other States, South Dakota, and Wyoming, and I think Nebraska, were not drawn on the same scale, so we had to reduce Royce's map to the same scale as Montana and North Dakota.

By Mr. LYONS. May I say this 18th Annual Report of the Bureau of American Ethnology is a public document. We have it here for the use of court and counsel. Of course, it contains hundreds of maps, and that is the sole reason for selecting these maps which will show the various Indian territories which are referred to in that subdivision of the bill of complaint which relates to the Fort Laramie Treaty of September 17, 1851, and the Blackfoot Treaty of October 17, 1855.

By the WITNESS. This is correctly made up.

By Mr. LYONS. We offer defendant Railway Company Exhibit No. 102 in evidence.

In answer to questions by Mr. McGowan:

The map was made under my direction. I have not had a great deal of experience in map making. I haven't any experience in scale.

By Mr. LYONS. Have you a draftsman in your department?

By the WITNESS. He reports to me and does this work under my direction. I am willing to say this work is correctly done.

By Mr. McGowan. We object to it on the ground the witness hasn't been qualified to testify in this connection.

1314 By the Master. I think I will admit it.

By the Witness. The legend and figures that appear on the map are Royce's (177–181).

NORTHERN PACIFIC EXHIBIT 102

This exhibit is a map on which are areas colored in green, purple, and pink (part of the pink area is marked by lines running from northeast to southwest and another part is marked by lines running from northwest to southeast), in parts of the States of North Dakota, Montana, and Wyoming. The green part is marked "529," the purple "620," and the pink "621." The map bears the legend:

Green 529, Purple 620, Pink 621: "'Mandan, Gros Ventre and Arriccara Territory,' as designated in Ft. Laramie Treaty of September 17, 1851."

Purple 620, Pink 621 (with lines running northwest to southeast), Pink 621: "'Mandan, Gros Ventre and Arriccara' Reservation, as designated in Executive Order of April 12, 1870."

Purple 620: "'Mandan, Gros Ventre, and Arriccara' Reservation restored to public domain by Executive Order of July 13, 1880."

Pink 621: Pink 621 (with lines running northwest to southeast). Pink 621 (with lines running northeast to southwest): "'Mandan, Gros Ventre, and Arriccara' Reservation, as defined in Executive Order of July 13, 1880."

This exhibit is impractical of inclusion in a printed record and will be certified in its original form.

By the Witness. Northern Pacific Exhibit 103 is a map showing the Crow Territory, as designated in the Fort Laramie Treaty of September 17, 1851. It is taken from Royce.

1315 By Mr. Lyons. I offer in evidence Exhibit No. 103.

By Mr. McGowan. I make the same objection as to the previous map.

By the Master. It will be admitted.

NORTHERN PACIFIC EXHIBIT 103

This exhibit is a map showing areas in Montana and Wyoming in the following colors with accompanying figures: Yellow, 517; Purple, 619; Pink, 635. It bears the following legend:

Yellow 517, Purple 619, Pink 635: "'Crow Territory' as designated in Ft. Laramie Treaty of September 17, 1851."

Purple 619, Pink 635: "'Crow Reservation' as defined in Treaty of May 7, 1868."

Purple 619: "'Crow Reservation' ceded under Agreement of June 12, 1880, ratified by Act of Congress of April 11, 1882; lands restored to public domain."

This exhibit is impractical of inclusion in a printed record and will be certified in its original form.

By the WITNESS. Northern Pacific Exhibit 104 is a map prepared as the previous exhibit, which shows in blue the Assiniboin territory as designated in the Fort Laramie Treaty of September 17, 1851.

By Mr. LYONS. We offer this exhibit in evidence.

By Mr. MCGOWAN. I make the same objection as to the previous maps.

Whereupon defendant Railway Company's Exhibit 104 was admitted in evidence (181).

NORTHERN PACIFIC EXHIBIT 104

This exhibit is a map showing an area, colored in blue, chiefly in Montana and extending a short distance into North
1316 Dakota marked "300." The legend for this area is as follows: "'Assiniboin Territory' as designated in Ft. Laramie. Treaty of September 17, 1851; 'The Assiniboin ceded this country by treaty in 1866, which Treaty was never ratified, but by their acceptance of a home on the reserve for the Blackfoot, Gros Ventre, Piegan, and River Crow, established April 15, 1874, they practically relinquished it.'—18 Annual Report of the Bureau of Ethnology 1896–97, page 767." This exhibit is impractical of inclusion in a printed record and will be certified in its original form.

By Mr. MCGOWAN. In the face of these being general maps to depict the territory, I have no objection, but if the maps are put in to show accurately where the lines are so that later on they might be used when it gets down to sections and quarter sections to show whether inside or out, I don't think it's admissible.

By Mr. LYONS. Of course, they are not.

By the MASTER. Your record will be protected. Of course, if they want to show a quarter section is somewhere, that is a different thing.

By the WITNESS. Northern Pacific Exhibit 105 is a map showing the location of the Sioux or Dakotah territory, as designated in the Fort Laramie Treaty of 1851, compiled from Royce's report, and the numbers and colorings are exactly the same, except that on 632 in South Dakota where Royce shows purple,

and in order not to conflict with 597 to the south, the State of Nebraska, we colored that in brown. That is the only change. This covers two of Royce's maps (182).

By Mr. McGowan. We make the same objection as to the previous exhibit.

By the Master. It will be admitted.

1317 NORTHERN PACIFIC EXHIBIT 105

This exhibit is a map showing areas in the following colors with accompanying figures: Yellow, 516; Green, 581 (both yellow and green areas are in North Dakota); Pink, 598; Brown, 632 (both pink and brown areas are in South Dakota and extend into North Dakota for a short distance); Purple, 597 (this area is in Wyoming, Montana, Nebraska, and extends a short distance into North and South Dakota).

The map bears the following legend:

Yellow 516, Green 581, Blue 584, Purple 597, Pink 598, and Brown 632: "'Sioux or Dacotah Territory' as designated in Ft. Laramie Treaty of September 17, 1851."

Pink 598 and Brown 632: "'Sioux Reservation' as defined in Treaty of April 29, 1868."

Yellow 516 and Green 581: "'Sioux or Dacotah Territory' relinquished under Treaty of April 29, 1868."

Blue 584: "'Sioux or Dacotah Territory' relinquished under Treaty of April 29, 1868, but rights reserved to hunt thereon 'so long as buffalo may range there in numbers sufficient to justify the chase'."

Purple 597: "'Sioux or Dacotah Territory' to be considered 'unceded Indian Territory under terms of Treaty of April 29, 1868'."

Green 581: "'Sioux Reservation' as defined by Executive Order of March 16, 1875."

This exhibit is impractical of inclusion in a printed record and will be certified in its original form.

By the Witness. Northern Pacific Exhibit 106 is a map compiled from Royce's reports showing in blue the common hunting ground as designated under treaty with the Blackfoot In-

1318 dians of October 17, 1855, and the land in purple, No. 574, and in pink, No. 565, is the Blackfoot territory as designated in the Treaty of October 17, 1855. We have superimposed on this map outlined in red the Blackfoot territory as designated in the Fort Laramie Treaty in 1851, taking the boundaries from Father DeSmet's map. The only addition on here that does not appear in Royce, from which I made up this map, is the red line

depicting the Blackfoot territory as designated in the Fort Laramie Treaty of September 17, 1851.

By Mr. LYONS. I offer this in evidence.

By Mr. MCGOWAN. Same objection.

By the MASTER. Same ruling (183).

NORTHERN PACIFIC EXHIBIT 106

This exhibit is a map showing areas in the following colors marked with the accompanying figures: Pink, part of which is lined, 565; purple 574 and 623; solid green 399; lined green 622; blue 398. Part of the solid green and blue areas is outlined with a heavy red line. These areas are all in Montana except part of the blue area (outlined with red line) which extends into Wyoming. The map contains the following legend:

Area outlined in red: "'Blackfoot Territory' as designated in Ft. Laramie Treaty of September 17, 1851."

Blue 398: "'Common Hunting Ground' under Treaty of October 17, 1855."

Green 399, Purple 574, and Pink 565: "'Blackfoot Territory' as designated in Treaty of October 17, 1855."

Lined Pink 565, Pink 565, and Purple 574: "'Blackfoot Reservation' as defined in Executive Order of July 5, 1873."

1319 Lined Pink 565, Pink 565: "'Blackfoot Reservation' as defined in Act of Congress of April 15, 1874."

Purple 574 "'Blackfoot Reservation' restored to public domain by Executive Order of August 18, 1874."

Lined Green 622 and Purple 623: "Addition to 'Blackfoot Reservation' as defined in Executive Order of April 13, 1875."

Lined Green 622: "'Blackfoot Reservation' restored to public domain by Executive Order of July 13, 1880."

This exhibit is impractical of inclusion in a printed record and will be certified in its original form.

At the request of Counsel for the Government, the following report made by the Northern Pacific Railway Company to the Interstate Commerce Commission, was copied into the record (187–190):

The Northern Pacific reports the following aids, gifts, grants, and donations as having been received by it on its predecessors. * * *

The full amount of the grant, had there been no losses, in the place limits or had the amount of land available in the indemnity limits been sufficient to offset the losses in the place limits, would have been about 43,000,000 acres. The Northern Pacific estimates that it will receive between 39,000,000 and 40,000,000 acres. This estimate is based on the 38,244,725.51 acres—considered as defi-

nitely ascertained, namely, 37,749,064.60 acres which have been patented, 444,922.13 acres which have been decreed to the Northern Pacific and selection rights to 50,738.78 acres; also the unpatented surveyed areas of 973,369.15 acres, and unpatented unsurveyed area of 980,021.50 acres. The two last-named amounts are estimates and include a considerable area the mineral or nonmineral character of which has not been determined, and a further considerable area on which there exist conflicting claims. The transactions in regard to this grant are recorded as follows:

1320 BY THE NORTHERN PACIFIC RAILROAD COMPANY FROM MAY 1872, TO AUG. 31, 1896

		Amount
Sales:		
Acres	8,517,100.203	$33,761,635.31
Lots	17,129¾	1,533,133.04
Timber and miscellaneous		1,902,492.69
Total		37,197,261.04
Interest on deferred payments		2,646,915.54
Disbursements:		
Expenses		8,186,393.82
Taxes		1,253,168.76
Total		9,439,562.58

BY THE NORTHERN PACIFIC FROM SEPT. 1, 1896, TO JUNE 30, 1917

		Amount
Sales:		
Acres	25,713,366.89	$68,949,565.33
Lots	17,022¼	212,076.33
Timber and miscellaneous		3,291,543.07
Total		72,453,184.73
Interest on deferred payments		4,811,172.03
Disbursements:		
Expenses		5,849,404.04
Taxes		5,754,571.80
Total		11,603,975.84

The amounts of $37,197,261.04 and $72,453,184.73 shown above include $18,062,210.79 representing deferred payments outstanding June 30, 1917.

The Northern Pacific reports that the unsold portion of the grant is approximately 5,800,000 acres and includes 11,019.48 acres used for railroad purposes by the Northern Pacific at date of valuation, but states that it is unable to make any estimate of the value at the time of acquisition of the lands to which it holds title or of those to which it expects to receive title.

The Northern Pacific estimates that it will receive about $19,000,000 from the sale of the 5,800,000 acres, and that the expenses

in connection therewith will approximate $7,400,000, leaving net proceeds of about $11,600,000.

1321 By the WITNESS. I made an investigation of the records of the Railway Company and went to Washington and made an investigation of the records in the office of the Commissioner of the General Land Office in order to ascertain whether or not there were homestead and preemption entries made in the territory covered by the Blackfoot Treaty of October 17, 1855, prior to the Treaty of April 15, 1874, creating the reservation for the Blackfoot tribes. We got certified copies of the abstracts of declaratory statements made under the Act of 1841, which were filed in the Helena Land Office for the various months in the years 1868, 1869, 1870, and I think 1871 and 1872. The certificate will show. Then I went down in the files in the General Land Office and looked up the papers that were filed there, the various files of the homestead applications, and some of them showed the date of settlements between 1855 and 1874. I secured certified copies of those papers, mostly the affidavit of the homestead applicant upon his making final proof. I looked through about twenty or twenty-five of the files of the various homestead applications, and some of them simply showed the final receipt. The party filing the declaratory statement would follow up with a cash entry and this would be in the final receipt showing paid-up money at that date, or filing some state scrip, but I wanted to get the date of the settlement and it was necessary to find one that followed up the declaratory statement with the homestead entry.

1322 By Mr. LYONS. We offer in evidence Northern Pacific Railway Company Exhibit No. 107, being a certified copy of the abstracts of Declaratory Statements under the Act of 1841, filed in the then United States Land Office in Helena, Montana, during the months of March, April, May, June, and November 1868, certified to by Thomas C. Havell, Assistant Commissioner of the General Land Office (191–192).

By Mr. MCGOWAN. Have you two or three records there—then my objections will cover all of them.

By Mr. LYONS. Here are about five of them.

By Mr. MCGOWAN. We object now to these documents as irrelevant and immaterial in connection with anything now pending before the Master, and for the additional reason that the respective rights of the defendants in this case of necessity are fixed by the terms of the Act of 1864, to the extent that the defendants come within it, and for the additional reason that the allowance of any entries by the Interior Department upon any of the lands in this controversy, is of no conse-

1323 quence and immaterial in so far as defining the rights of the Railway Company to the lands covered by any of these Indian Treaties; in other words, it doesn't make any difference what the Interior Department did—if they allowed those entries on there that doesn't establish the claim of the Railroad Company to it (193).

By the MASTER. I think I will admit them subject to the objections.

By Mr. LYONS. I offer Exhibits No. 108, 109, 110, and 111, and I understand the objection counsel for the Government has just made runs to these exhibits.

By Mr. MCGOWAN. Yes.

By the MASTER. They will be admitted.

NORTHERN PACIFIC EXHIBITS 107 TO 111, INCLUSIVE

(Northern Pacific Exhibit 107 is a certified copy of abstracts of declaratory statements filed in the Helena, Montana, Land Office during the months of March, April, May, June, and November, 1868. It contains abstracts of 181 entries. The information as to each entry shown is office number of the entry, date it was filed, name of person making declaratory statement, description of land included in the entry, and date of settlement. The dates of settlement were in the years 1864 to 1868, inclusive. The remaining exhibits contain information similar to that in Exhibit 107 and are summarized as follows: Exhibit 108 contains abstracts of 214 entries filed February, March, May, and June, 1869. The dates of settlement shown in the entries are 1862–1869, inclusive. Exhibit 109 contains abstracts of 380 entries filed February to May, inclusive, and October and December 1870. The dates of settlement shown in the entries are 1863–1870, inclusive. Exhibit 110 contains abstracts of 83 entries filed in October 1871. The dates of settlement shown in
1324 the entries are 1864–1871, inclusive. Exhibit 111 contains abstracts of 111 entries filed in February and September 1872. The dates of settlement shown are 1865–1872, inclusive. The lands described in Exhibits 107 to 111, inclusive, are situated in the following townships and ranges:

T. N.	R. W.	T. N.	R. W.
1	1	9	13
"	3	10	1
2	2	"	2
"	3	"	3
"	5	"	4
3	2	"	7
4	10	"	11

T. N.	R.—Continued. W.—Continued.
5	3
"	9
"	10
6	4
"	9
7	4
"	9
"	10
8	8
"	9
9	1
"	2
"	3
"	9
"	10
"	11

N.	R.—Continued. W.—Continued.
"	12
"	13
11	2
"	3
"	4
"	5
12	1
12	5 (Part Secs. 5, 7, 8)
12	20
13	19
"	20
14	20
"	21
20	6 (Part Secs. 2, 11, 17)
21	1 (Part Sec. 25)

1325

T. N.	R. E.
1	1
"	2
"	3
"	4
"	5
"	6
2	1
"	2
"	3
"	4
"	5
"	6
3	4
4	1
5	1
"	2
6	2
7	1
"	2
8	1
"	2
9	1
"	2
19	2 (Part Sec. 8)
20	3 (Part Secs. 5, 8, 11)
21	1 (Part Secs. 28, 30)
S.	E.
1	1
"	2
"	3
"	4
"	5
"	6

T. S.	R. E.
2	2
"	4
"	5
"	6
3	4
"	5
S.	W.
1	1
"	5
2	2
"	6
3	1
"	5
"	6
4	1
"	5
"	6
"	7

1326

5	1
"	4
"	5
"	6
"	7
"	8
6	1
"	3
"	4
"	8
7	8
"	9
8	4
"	9
9	4

By Mr. LYONS. I offer in evidence Northern Pacific Railway Company Exhibit No. 112, being a copy certified by the Commissioner of the General Land Office of the homestead application and final affidavit of Allen Stewart, under Homestead Entry 154, final certificate No. 22, Helena series, Montana.

By Mr. McGowan. Same objection.

By the Master. Same ruling (194).

NORTHERN PACIFIC EXHIBIT 112

(This exhibit is Homestead Application No. 154 of Allen Stewart, filed in the Land Office at Helena, Montana, February 21, 1870, under Act of Congress approved May 20, 1862, entitled "An Act to secure homesteads to actual settlers on the public domain." It contains legal description of certain lands in Sections 8 and 9, T. 6 N., R. 2 E. His affidavit, subscribed to May 26, 1875, states that he has resided on this land since February 21, 1870.)

By Mr. Lyons. Exhibits No. 113, 114, 115, 116, 117, 118, 119, 120, and 121 are of the same general character.

By Mr. McGowan. I make the same objection.

By Mr. Lyons. I offer them in evidence.

1327 Whereupon Exhibits 113 to 121, inclusive, were admitted in evidence (195).

NORTHERN PACIFIC EXHIBITS 113 TO 115, INCLUSIVE

These exhibits are certified copies of homestead applications filed in the Land Office at Helena, Montana, under Act of Congress approved May 20, 1862, entitled, "An Act to secure homesteads to actual settlers on the public domain." The following information is contained in them:

N. P. ex. No.	Homestead application No.	Name of applicant	Date of filing	Land applied for	Date affidavit required of homestead claimants, acts of May 20, 1862, and June 21, 1866, subscribed to	Date applicant commenced residing on land applied for
113	21	Peter Morison...	12/12/68	S½SE¼, S½S½W¼, Sec. 9, T. 10 N., R. 3 W., 160 acres.	7/3/75 affidavit executed by William L. Steele, administrator of estate of P. Morison.	12/12/68 to date of decease.
114	116	John J. Tomlinson.	11/10/69	NE¼SW¼, W½SW¼, SW¼NW¼, Sec. 11, T. 3 S., R. 4 E., 160 acres.	----------	

Across the face of the application is written "Commuted by Cash R. & R. 222. Nov. 19/70. I. P. Driver." On the back of the application is written "Seven years expired. Letter to R. & R. November 22, 1878—giving 60 days to show cause why entry should not be canceled."

115	45	John R. Barnett.	6/19/69	W½SE¼, Sec. 12 and W½NE¼ Sec. 13, T. 10 N., R. 2 W., 160 acres.	4/3-75 ----------	6/19/69.

1328 Attached to this application is a declaration of abandonment filed on June 19, 1869, of E½NE¼, SE¼NW¼, of Sec. 13, covered by the applicant's Declaratory Statement No. 210 filed on November 9, 1868.

NORTHERN PACIFIC EXHIBIT 116

(This exhibit is a certified copy of a preemption claim of Jacob Nave in the Helena, Montana, Land Office, dated November 29, 1869. The land covered by the claim is S½SE¼, Sec. 31, T. 1 N., R. 1 E., NE¼NE¼, Sec. 6 and NW¼NW¼, Sec. 5, T. 1. S., R. 1 E. It states that Nave filed his Declaratory Statement No. 449 on March 16, 1869, amended on the date of the execution of the document, alleging settlement on June 22, 1864, and that there appearing no other filings or claims adverse to the claim of Nave, said claimant was allowed to make his proof.)

NORTHERN PACIFIC EXHIBIT 117

(This exhibit is a certified copy of a document entitled "In U. S. Land Office, Helena, M. T., In Matter of Cash Entry 141, by John J. Woods—of March 1, 1870, for S½SE¼, Sec. 10 and W½NW¼, Sec. 11 T. 10 N.—R. 3 W., Unoffered." The affidavit of Mr. Woods, subscribed to July 22, 1871, before the Register, states that he first made settlement on said land in October 1865.)

NORTHERN PACIFIC EXHIBIT 118

(This exhibit is a certified copy of a preemption claim of Gilbert Benedict filed in the Helena, Montana, Land Office, December 3, 1868. The land covered by the claim was W½SE¼, W¼NE¼, Sec. 13, T. 10 N., R. 3 W. It states that Benedict filed his Declaratory Statement No. 73 on May 13, 1868, alleging settlement on January 5, 1865, and that there appearing no
1329 other filings or claims adverse to the claim of Benedict, said claimant was allowed to make his proof.)

NORTHERN PACIFIC EXHIBIT 119

(This exhibit is a certified copy of homestead proof and final affidavit of James W. Austin. The affidavit, subscribed to December 20, 1901, before the Register at Helena, Montana, states that Austin made entry on Lots 3 and 4, Sec. 1, T. 16 N., and Lots 10 and 11, Sec. 36, T. 17 N., R. 2 W., subject to entry under Section 2289 R. S., and that he has resided on that land since July 1881.)

NORTHERN PACIFIC EXHIBIT 120

(This exhibit is a certified copy of Homestead Application No. 245 of Solomon C. Prentice, filed in the Land Office at Helena, Montana, May 24, 1870, under Act of Congress approved May 20, 1862, entitled "An Act to secure homesteads to actual settlers on the public domain." It covers SW¼SW¼, Sec. 1, N½NW¼, NE¼NE¼, Sec. 19, in T. 4 S., R. 5 W., containing 159.60 acres. This entry was amended to cover N½NW¼, N½NE¼, Sec. 19, T. 4 S., R. 5 W. His final affidavit subscribed to October 19, 1875, states that he has resided on this land since September 1870.)

NORTHERN PACIFIC EXHIBIT 121

(This exhibit is a certified copy of a preemption claim of George E. Carpenter filed in the Helena, Montana, Land Office, January 4, 1869. The land covered by the claim was south fractional half of SW¼, NE¼SW¼, Sec. 18, T. 10 N., R. 3 W. It states that Carpenter filed his Declaratory Statement No. 53 on April 22, 1868, alleging settlement on March 15, 1868, and that there appearing no other filings or claims adverse to the claim of Carpenter, he was allowed to make his proof.)

1330 By the WITNESS. Northern Pacific Exhibit 122 is a triplicate copy of the list filed by the Northern Pacific Railway Company in the Miles City office, No. 414, given Serial Number 011152, for selections of lands within the second indemnity limits of the company's grant, signed by the Land Commissioner of the Railway Company, and by the Register and Receiver, and the list of lands selected by the company in the Miles City Land Office on December 7, 1910, with the list of the tracts within forty miles of the line of railroad to the south in lieu of which the selected tracts were taken. It shows the description, section, township, and range of the lands lost to the grant as a basis for the selected tracts by description, section, township, and range, and in the remarks it shows the reason for the loss, being homestead entries, declaratory statement, timber entries, the date of the filing of these various entries, and the date of patent.

All of these lands shown as lost in the Northern Pacific grant are within the territory covered by the Blackfoot Treaty of October 17, 1855. This list was first prepared by the Railway Company and submitted to the United States (195–196).

It was approved by the local land office and the original was sent to the Commissioner of the General Land Office and became a basis for clear listing and patent (197).

All the lands on that list have been patented.

By Mr. McGOWAN. I am willing to admit it subject to any further examination we may make to check up on it.

Whereupon Northern Pacific Exhibit 122 was admitted in evidence (199).

1331 NORTHERN PACIFIC EXHIBIT 122

(This exhibit is a copy of a selection list for the selection of lands within second indemnity limits filed in Miles City Land Office December 7, 1910, which discloses that thereby the company selected lands in T. 16 N., R. 38 E., Montana, second indemnity, on the basis of losses in T. 10 N., R. 2 W., Montana. 8,268.07 acres were selected and patented in lieu of losses of 8,254.84 acres situated in seventeen odd-numbered sections of said township.)

By the WITNESS. Northern Pacific Exhibit 123 is a triplicate copy of the list filed in the Miles City Land Office by the Railway Company of selections of public lands made by the company on August 20, 1918, List 515 and Serial No. 034744. It is the same type of document as Northern Pacific Exhibit 122. The base lands shown on this list are in territory covered by the Blackfoot Treaty of October 17, 1855.

By Mr. LYONS. I offer in evidence Northern Pacific Railway Company Exhibit No. 123.

By Mr. McGOWAN. The same objection.

By Mr. MASTER. Same ruling.

By the WITNESS. The lands were all patented to the Railway Company in October 1923.

By Mr. McGOWAN. I make the same objection (200).

NORTHERN PACIFIC EXHIBIT 123

(This exhibit is a copy of a selection list for the selection of lands within second indemnity limits filed in the Miles City Land Office August 20, 1918, which discloses that thereby
1332 the company selected lands in T. 4 S., R. 44 E., Montana, second indemnity, on the basis of losses in T. 10 N., R. 3 W., Montana. 4,683.23 acres were selected and patented in lieu of losses of 4,690.11 a res situated in fifteen odd-numbered sections of said township.)

By the WITNESS. Northern Pacific Exhibit 124 is a duplicate of the list filed by the Northern Pacific Railway Company in Lewiston, Montana, April 15, 1918, rejected April 15, 1918, and approved April 29, 1918, List No. 62CA and given Serial Number 041509. The same explanation with respect to Exhibit 122 applies to this exhibit.

By Mr. LYONS. We offer this exhibit in evidence.

By Mr. MCGOWAN. Same objection.

By Mr. MASTER. Same ruling.

By the WITNESS. The lands shown as lost are within the territory of the Blackfoot Treaty of 1855. I was in charge of the office records at the time the patents were issued and I know of my own knowledge patents were received for this land.

By Mr. MCGOWAN. Same objection.

By the WITNESS. The date of the patent is October 6, 1923 (200–202).

NORTHERN PACIFIC EXHIBIT 124

(This exhibit is a copy of a selection list for the selection of land, filed in Lewiston, Montana, Land Office, April 15, 1918, approved April 29, 1918, which discloses that thereby the company selected lands in T. 10 N., R. 13 E., Montana, on the basis of the following losses in Montana:

1333 Section	Township north	Range west
Parts of—		
25	10	1
29	5	3
27, 29, 35	11	3
15	15	3
13	5	4
9, 13	10	4
5	6	9

723,68 acres were selected and patented in lieu of losses of 741.42 acres situated in seven townships.)

By the WITNESS. Northern Pacific Exhibit 125 is a triplicate copy of the list filed by the Northern Pacific Railway Company on the second indemnity lands within the limits of its grant, given list No. 412 and Serial Number 011150, filed in Miles City, Montana, December 7, 1910. The lost lands are within the territory covered by the Blackfoot Treaty of October 17, 1895.

By Mr. LYONS. We now offer Northern Pacific Railway Company Exhibit No. 125 in evidence.

By Mr. MCGOWAN. Same objection.

By the MASTER. Same ruling.

By the WITNESS. I know the lands are all patented (203–204).

NORTHERN PACIFIC EXHIBIT 125

(This exhibit is a copy of a selection list for the selection of lands within the second indemnity limits filed in Miles City Land Office, December 7, 1910, which discloses that thereby the company

selected 18,439.91 acres in Ts. 15 and 16 N., R. 37 E., Montana, second indemnity, in lieu of 18,459.02 acres lost in parts of 85 sections described as follows:

1334 Section	Township south	Range east
Parts of—		
7	1	1
5	3	2
19, 31	2	2
1	1	3
11, 13, 15	2	4
9, 11, 15, 23, 25, 27, 33	3	4
	North	
1	8	1
27, 33, 35	2	3
1, 3, 7, 9, 13, 15, 17, 19, 21, 23, 25, 29, 31	1	4
23, 33, 35	2	4
11, 15, 23	10	4
1, 3, 21, 35	11	4
13, 25	12	4
1, 3, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35	1	5
11	2	5
1, 9, 11, 15, 25, 29	9	5
5, 9, 15, 25, 35	10	5
9	11	5
17	1	6
1, 3, 5, 11, 13, 25	8	6
3, 5, 7, 9	9	6

By the WITNESS. Northern Pacific Exhibit 126 is a map of the State of Montana taken from a tracing of the United States Geological Survey. On this we have shown in orange the boundaries of the Blackfoot Territory. The broken orange strip is the ten-mile strip which is referred to in the Treaty of 1855, which is in the Blackfoot Territory. The yellow line to the south marks the boundaries of the common hunting ground, as defined in the Treaty of 1855. If you take all three together you have the entire territory covered by the Treaty of October 17, 1855.

We have shown on this map with the small red dots the locations of the various declaratory statements as shown by the abstracts of declaratory statements under the Act of 1841, which are covered in our Exhibits 107–111. The large red dots show the locations of the homestead entries that are covered by
1335 Exhibits 112–121. Dot No. 8 is covered by the homestead entry of James W. Austin for lands in Sec. 1, T. 16 N., and lands in Sec. 36, T. 17 N., R. 2 W., as shown on Exhibit 119, and the date of settlement is March 10, 1870. There is a dot in the wrong place here. Number 118 in the affidavit of the homestead application or preemption application of Gilbert Benedict shows he settled on Sec. 13, T. 10 N., R. 3 W., and the records of the General Land Office show that corrected to Sec. 13, T. 13,

R. 4 W. This work was done under my personal direction and it is correct.

By Mr. LYONS. We offer this map, Exhibit 126, in evidence.

By Mr. MCGOWAN. Same objection.

By the MASTER. It is admitted subject to the objections.

By the WITNESS. This exhibit doesn't show any of the lands shown as lost in Exhibits 122, 123, 124, and 125. We would have to find the descriptions of the tracts lost and look for it on the map (204–206).

NORTHERN PACIFIC EXHIBIT 126

(This exhibit is a map entitled "N. P. Ry. State of Montana, Tracing of U. S. Geological Survey Map." Areas are outlined on the map in orange, broken orange, and yellow. The map bears the following legend: Orange: "Boundaries of Blackfoot Territory as defined in Treaty of October 17, 1855—11 Stat. 657"; Broken Orange: "Boundaries of Ten Mile Neutral Strip"; Large and small red dots: "Settlements within area designated in Treaty of October 17, 1855, initiated prior to Treaty with Blackfoot Indians of April 15, 1874." The City of Helena is located on the boundary line between the ten-mile neutral strip and the common hunting ground. Virginia City is located in the south central portion of said common hunting ground. A number of the small dots that designate the entries shown by Northern Pacific Exhibits 107–111, inclusive, are located in Gallatin Valley near Bozeman and between Bozeman and Manhattan in the common hunting ground. A number of said small dots are shown in the neutral strip and near Helena. Another group of said small dots is located near and northeast of Dillon in the Beaverhead and Ruby River Valleys in said common hunting ground. This exhibit is impractical of inclusion in a printed record and will be certified in its original form.)

1336

By the WITNESS. Northern Pacific Exhibit 127 is a map prepared by G. A. Daidy on January 18, 1932, showing the boundaries of the treaty of Fort Laramie in 1851 and the land grant limits of the Union Pacific and Kansas Pacific railroads. G. A. Daidy is a draftsman in Washington, D. C. I don't think he is in Government service, private business. I checked this map during the month of March 1932, while I was in Washington, with the large map which is on file in the drafting division of the General Land Office, on which has been shown the location of the various Indian territories as designated in the Fort Laramie Treaty of 1851. I then checked the limits of the Union Pacific and Kansas Pacific grant with the records of Division "F"

of the General Land Office. They have an atlas showing the limits of the railroad and wagon road grants in various States, which are State maps on which are shown the approximate lateral limits of the various land grants in the States. I also checked this map with the record of railroad withdrawals, Nebraska, Kansas, Colorado, Nevada, Utah, and Wyoming, Railroad Division of the General Land Office, which are two records showing the lateral limits of land grants on township and range diagrams.

The map truly shows what it purports to show.

1337 By Mr. LYONS. We offer in evidence Northern Pacific Railway Co. Exhibit No. 127.

By Mr. MCGOWAN. We object to it on the ground of its competency, relevancy, and materiality, and the particular objection being this, that the whole purport of this map is to show where the Union Pacific grant runs through the so-called Cheyenne and Arrapaho lands, and that question has absolutely no bearing on the Northern Pacific controversy now before the Master. (206–209.)

By the MASTER. I think it may have some bearing and I will admit it subject to the objection, for any purpose.

NORTHERN PACIFIC EXHIBIT 127

(This exhibit is a map entitled "Map Showing Boundaries of Treaty of Fort Laramie 1851 and Land Grant Limits of the Union Pacific and Kansas Pacific Railroads." It shows areas outlined in colors marked "Blackfoot," "Assiniboin," "Gros Ventre etc.," "Crow," "Sioux," and Cheyenne and Arrapaho." It shows the limits of the Union Pacific and Kansas Pacific railroads colored in orange. This exhibit is impractical of inclusion in a printed record and will be certified in its original form.)

By the WITNESS. Exhibit 127 doesn't show the townships and ranges covered by the Indian territory, or the grants to the Union Pacific and Kansas Pacific railroad, so in order to make a computation of the area of the Union Pacific and Kansas Pacific grant it was necessary to superimpose these limits upon the maps of the Commissioner of the General Land Office. I had a draftsman do that work under my personal direction, and I checked it to make sure he was correct. We then checked out the area in each township in the conflict of the two grants

1338 (Union Pacific and Kansas Pacific with the territory of the Sioux and Cheyenne Indians, as defined in the Treaty of September 17, 1851. The Union Pacific and Kansas Pacific territory is shown in pink. The area computed in this way is within the limits of the land outlined in blue as the

Sioux territory, designated in the Treaty of 1851, and the limits of the Cheyenne territor, as outlined in the map in yellow.

Q. Can you state the number of acres?

By Mr. McGowan. We object on the ground of its relevancy, competency, and materiality and for the same objection as to the map itself—it doesn't have any bearing on the issues before the court.

By the Master. I will admit it subject to the objection.

By the Witness. The approximate area of odd-numbered sections within the limits of the grants to the Union Pacific and Kansas Pacific Railroads and also within the territory of the Indians as outlined in the treaty of 1851, is as follows:

Union Pacific R. R. Co.:	
Nebraska	1,929,500
Colorado	538,660
Wyoming	2,109,870
Or a total for the Union Pacific of	4,578,030
Kansas Pacific R. R. Co.:	
Kansas	916,880
Colorado	3,422,680
With a total of	4,339,560
And a grand total for both railroad grants of	8,917,590

I went to the tract books of the General Land Office, Division "O", and took two or three or four townships in each grant in each state, and secured the dates of the patents of the Union Pacific and Kansas Pacific Railroads, of the odd-numbered sections within those various townships. I did not try to check the whole eight million acres. I took townships scattered through.

1339 By Mr. Lyons: I may say the proof we will rely on to show the Union Pacific did get these lands is a government document which I will ask the court to take judicial notice of at the proper time (210–212).

CROSS-EXAMINATION

Referring to Exhibit 127 I testified with reference to the territory of the Union Pacific and Kansas Pacific in conflict with the Cheyenne, Arrapaho, and Sioux lands. The map prepared by Mr. Daidy was not on a scale that I could compute the area so I had the draftsman under my personal direction and check superimpose Daidy's work upon the maps of the Commissioner of the General Land Office. He worked it as Daidy has shown the lines exactly through the country. He did not make the calculations with a planimeter. I did not make any tabulation of those lands as to areas. A man working under my direction did that. I have the list here (215–216).

NORTHERN PACIFIC EXHIBIT 128

(This exhibit, received in evidence, is copy of an address made by Frederick Billings, President of Northern Pacific Railroad Company, before the House Committee on Pacific Railroads, April 15, 1880 (213). Said address is printed at pages 4388–4394 of Joint Committee Record. Mr. Billings stated that construction was under way on the division between the Missouri River and the Yellowstone, that materials all had been provided, and that it was expected to complete that division during 1880; that work was progressing on the Pend d'Oreille Division, extending 209 miles from the mouth of Snake River on the Columbia to Lake Pend d'Oreille, that all necessary materials for completing the division had been purchased and if unforseen
1340 difficulties did not arise it was expected to complete the division during 1880. He said in the two Congresses preceding the company applied for a bill extending the time for construction of the road. In each of those Congresses an extension bill passed the Senate almost unanimously, and failed of passage in the House because it could not be reached in the ordinary course of business. He urged that a bill declaring a forfeiture of the lands should not be reported to the House of Representatives.)

NORTHERN PACIFIC EXHIBIT 130

(This exhibit, received in evidence over the objection that it was irrelevant and immaterial, is a certified copy of Railroad Clear List No. 24, dated July 30, 1896, approved August 17, 1896. Among the primary lands clear-listed was W2SE4, Sec. 27, T. 13 N., R. 19 W.)

Counsel for defendant railway company made the statement that said Northern Pacific Exhibit 130 was offered to show the date of approval of the clear list for said land and to show that the land referred to by witness Will Cave was not included in the Schedule A lands sold by Special Master Cary at Missoula, and that it was covered by the Schedule C lands that were sold in one group (219).

1613. HEARING COMMENCING JUNE 26, 1939

The following proceedings were had: (The testimony appears in question and answer form:)

Colloquy

Mr. DAPONTE. If Your Honor please, there were certain matters left undetermined by Your Honor's rulings on the exceptions

made last spring, which might have required, would have required, further extended hearings. Those matters have been compromised and settled by the parties, and the stipulation has been made. Now, furthermore, Your Honor's rulings required recasting of the tabulations—they would have had to be recast even under the Master's rulings—that has been done, and copies have been exchanged and both parties have some small matters to offer in evidence to complete the record and support the findings which will settle all of the issues in the case.

I would like to call Mr. Schwarm to come around to identify these documents. Preliminary, though I will offer in evidence the stipulation covering the settlement.

The COURT. Are you offering that now?

Mr. DAPONTE. Yes; I think it would be just as well.

Where is that Exhibit A, didn't you give me the originals to all of them?

The CLERK. What do you want?

Mr. DAPONTE. I want Exhibit A.

The CLERK. Here is the stipulation.

Mr. DAPONTE. We offer in evidence Northern Pacific Exhibit A, which is an affidavit of Verner A. Gillis. I do not think it is necessary to describe that. It relates to the description of certain lands which have been substituted as to the range, etc.

1614 The COURT. Let those exhibits be admitted in evidence.

NORTHERN PACIFIC EXHIBIT A

(This Exhibit, here received in evidence, is an affidavit of Verner A. Gillis to the effect that certain lands described in a tabulation attached thereto, which have heretofore been obtained by the railroad company or railway company by use of supposed losses arising in the area of the Portage Conflict and aggregating 291,189.16 acres, are non-coal and non-iron lands.)

Mr. DAPONTE. Northern Pacific Exhibit A–1, entitled stipulation relative to Defendant's motion to re-refer and amendments to bill of complaint.

The COURT. It will be admitted.

NORTHERN PACIFIC EXHIBIT A–1

(This exhibit, here received in evidence, is a stipulation to the effect that Northern Pacific Exhibit A may be received in evidence as proof of the non-coal and non-iron character of certain lands and that the plaintiff's bill of complaint may be amended to embrace plaintiff's claim to compensation for certain other lands.)

Mr. DAPONTE. We offer Northern Pacific Exhibit B, which is another stipulation relative to proof, non-coal and non-iron character of certain lands and the tabulations are attached under one cover.

Mr. DANLY. I assume that Mr. Schwarm was sworn to testify before the Master, and I do want to ask him two or three questions relative to this exhibit before I make my objection.

The COURT. All right.

Mr. DAPONTE. I was going to say, couldn't it be understood, not waiving any objections, when I put him on the stand you
1615 could ask him the questions at that time and keep it in order?

Mr. DANLY. I think the record will be better if my objection is made to each exhibit as it is offered.

The COURT. All right, we will reserve the ruling on that one until after you have had an opportunity to ask the questions you have in mind.

Mr. DAPONTE. We offer as Northern Pacific Exhibit B-1, which is a stipulation dated March 23, 1939, and it was under that stipulation, Your Honor, that the unsettled matters were disposed of which made it unnecessary for further hearings in that case.

The COURT. No objection to that, Mr. Danly?

Mr. DANLY. There will be an objection, but I want to ask the witness a question before I made objection on it.

The COURT. To this one, too?

Mr. DANLY. Yes.

The COURT. I will reserve the ruling——

Mr. DANLY. Excuse me; I misstated it; there will be no objection to this last exhibit.

The COURT. All right. Let it be entered accordingly and admitted as an exhibit.

NORTHERN PACIFIC EXHIBIT B-1

This Exhibit, here received in evidence, is a stipulation dated March 23, 1939, the body of which (exclusive of attached tabulations) reads as follows:

There are certain issues not determined by the Master's second report, filed July 26, 1937, or the order of court on exceptions to said report, filed March 22, 1938, which unsettled issues have been made the subject matter of plaintiff's motion for leave to amend, filed on July 26, 1938, and of defendants' motion for settlement of the form of findings and decree and for re-reference, filed on or about November 8, 1938. The parties have agreed upon a settlement of said issues and of an issue growing

1616 out of the government's claim that the company does not have a right to select any lands in place limits of the grant in satisfaction of mineral losses which issue is the subject matter of a proposed motion by plaintiff for leave to amend its bill of complaint.

Therefore, it is stipulated and agreed by and between counsel for the respective parties as follows:

First: The Northern Pacific Railway Company accepts liability to compensate the United States for lands involved in the Portland and Ainsworth terminal errors, aggregating approximately 65,829.77 acres, of which approximately 4,295.52 acres are involved in the Portland terminal error and 61,534.25 acres are involved in the Ainsworth terminal error. The amount of such compensation shall be determined and charged to defendants by the court at the time the amount of compensation, if any, due the defendants on account of withdrawn lands involved in this suit is determined. The numerical descriptions of the lands referred to in this paragraph are contained in a tabulation marked Exhibit "A", attached hereto and made a part hereof.

Second: The Northern Pacific Railway Company will relinquish or withdraw its selections of approximately 4,380.47 acres of restored Crow Indian reservation lands located in the primary limits of the grant of 1864 in Montana and selected in satisfaction of mineral losses, except 340 acres of such lands which have been sold by said company and for which the court may decree that the said Northern Pacific Railway Company is entitled to patent from the United States. The numerical descriptions of the lands referred to in this paragraph are contained in a tabulation marked Exhibit "B", attached hereto and made a part hereof.

Third: The Northern Pacific Railway Company will relinquish or withdraw its selections of approximately 22,154.98 acres, of which 21,709.46 acres are in the grant of 1864 in the States of Wisconsin, Minnesota, Montana, Idaho, and Washington, outside the area of the restored Crow lands, and 445.52 acres are in the grant of 1870 in the States of Washington and Oregon, not included within the area of said restored Crow lands, all of which lands have been selected by the company in satisfaction of mineral losses but for which patents have not been issued. The numerical descriptions of the lands referred to in this paragraph are contained in a tabulation marked Exhibit "C", attached hereto and made a part hereof.

Fourth: Defendants will not appeal from the decision of this court in favor of the United States on the so-called Absaroka and Beartooth point, involving 314,544.06 acres of withdrawn lands in the primary limits of the grant of 1864 in the State of

Montana, and will accept and abide by the decision of the District Court with respect to said lands.

Fifth: The United States will abandon its claim to compensation for approximately 63,295.02 acres of lands within the primary limits of the grant of 1864 in Montana and within
1617 the area of restored Crow lands, all of which have been patented to the Railway Company in satisfaction of mineral losses, being the same lands made the subject matter of plaintiff's said motion to amend the bill of complaint, and the defendant Railway Company's title to said lands shall be confirmed and quieted by the decree to be entered herein. The numerical descriptions of the lands referred to in this paragraph are contained in a tabulation marked Exhibit "D", attached hereto and made a part hereof.

Sixth: The United States will abandon its claim to compensation for approximately 4,390.03 acres, of which 3,868.34 acres are in the primary limits of the grant of 1864 in the States of Wisconsin, Minnesota, Montana, Washington, and Oregon. All of said lands are outside the restored Crow area, have been patented to the Railway Company in satisfaction of mineral losses, and title of Northern Pacific Railway Company thereto shall be quieted and confirmed by the final decree. The numerical descriptions of the lands referred to in this paragraph are contained in a tabulation marked Exhibit "E", attached hereto and made a part hereof.

It is understood that the making and carrying out of this stipulation shall not operate to the prejudice of any party to this suit with respect to any other questions or points involved in the suit.

Dated March 23, 1939.

1618 Mr. DAPONTE. I have an order here on that stipulation.

The COURT. That is what, Mr. daPonte?

Mr. DAPONTE. I have an order prepared, which in a way approves the stipulation. I do not know whether this order is necessary or not, but we had one for the other stipulation, and I suppose just to complete the record we might have that one signed. It will probably not be heard of hereafter.

The COURT. The dates ought to be inserted here.

Mr. DAPONTE. Will you insert the dates, Mr. LaFromboise

The COURT. Have you seen that, Mr. Danly?

Mr. DANLY. I do not think so; I had one on the former——

Mr. DAPONTE. (Interposing). I think I sent you a copy. See if you have not seen that.

The COURT. Just a minute; let us get that order on the stipulation disposed of—it is short.

Mr. DANLY. I have seen the order.

The COURT. Insert the dates, Mr. Clerk.

L. L. Schwarm, called as a witness in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION

By Mr. DAPONTE:

Q. Mr. Schwarm, you have testified in this case before?

A. I have.

Q. I will show you a large tabulation of lands, marked Northern Pacific Exhibit C. What is that, and what is the purpose of it?

A. That is a schedule of the lands within the first indemnity limits of the states of Minnesota, North Dakota, and Montana which had been selected by the Northern Pacific Railway, Northern Pacific Railroad Company, in lieu of losses in the state
1619 of Wisconsin now falling within Area "A" of Portage, Winnebago, and Superior Overlap, and schedule of losses offered to support the non-coal and non-iron selected lands. It also includes a schedule of the lands in the first indemnity limits in the states of North Dakota, Montana, and Wyoming for which Portage losses were assigned and for which the Railway Company was not prepared to show the selected lands were non-coal and non-iron in character and therefore non-mineral losses are assigned.

Q. Mr. Schwarm, is that the stipulation which is referred to in our findings which we will offer in paragraph G, page 41, relating to the Portage Point?

A. It is the same exhibit.

Q. And that tabulation is supported by the affidavit of Gillis, which has already been offered?

A. It is.

Mr. DAPONTE. We offer that schedule in evidence.

Mr. DANLY. Are you making the offer now?

Mr. DAPONTE. Yes; subject to your objection, that you are going to state after you——

The COURT (interposing). Is this the witness you wanted to interrogate?

Mr. DANLY. Yes; I want to ask him about this one and two preceding.

The COURT. Just go ahead.

CROSS-EXAMINATION

By Mr. DANLY:

Q. Mr. Schwarm, will you tell the Court the character of the base that is now assigned to these Portage lands you have just identified?

A. Some are based on mineral losses; some are nonmin-
1620 eral. The mineral losses are offered to support the selected lands which are covered by the affidavit of Mr. Gillis as to their noncoal and noniron character.

Q. Approximately how much mineral base is assigned?

A. Approximately 290,000 acres.

Q. What is the character of that mineral base—how is it established?

A. Most of it, I would say, was under the Classification Act of 1895. There may be some entries in there on patented mineral lands or there may be some adjudication as mineral under hearings in the general land office.

Q. You say, the most of it was mineral losses resulting from the classification made under the Act of February 26, 1895?

A. It was.

Mr. DANLY. The Plaintiff now objects to the exhibit for the reason that it appears that a large part of the losses assigned as base are losses growing out of the classification made under the Act of February 26, 1895.

The COURT. What is the pertinency of that?

Mr. DANLY. It is for the purpose of saving our record on the mineral point.

The COURT. The objection will be overruled.

The CLERK. As to which one are you making that?

Mr. DAPONTE. Exhibit C.

The COURT. To which exhibit now, does that relate?

Mr. DANLY. Exhibit C.

The COURT. Exhibit C will be admitted in evidence.

NORTHERN PACIFIC EXHIBIT C

(This Exhibit, here received in evidence, is a schedule of lands in the first indemnity limits of the grant of 1864 in Minnesota,
North Dakota, and Montana patented to the Northern
1621 Pacific Railroad or Railway Company in lieu of losses in the State of Wisconsin within area "A" of the Portage, Winnebago, and Superior Overlap, showing mineral losses assigned, tract for tract, to support the noncoal and noniron patented lands. The schedule shows 291,189.16 acres of patented lands to which mineral base aggregating 291,208.12 acres are now assigned. The patented lands are the lands referred to in the affidavit of Verner A. Gillis, Northern Pacific Exhibit A. The Exhibit also includes a schedule of lands in the first indemnity limits of North Dakota, Montana, and Wyoming, selected in lieu of losses in the State of Wisconsin falling within Area "A" of the Portage, Winnebago, and Superior Overlap, showing an as-

ignment, tract for tract, of nonmineral losses assigned to support the lands so patented. This schedule contains the numerical descriptions of 54,895.94 acres of patented lands to which 54,903.18 acres of nonmineral loss is now assigned.

Mr. DAPONTE. Do you want to ask him anything on the other exhibits?

Mr. DANLY. Yes.

Q. As part of the Exhibit B which was just offered in evidence, is there a tabulation of lands, or perhaps two tabulations of lands, making assignment of base to lands in Minnesota and also lands obtained in the grant of 1864 under losses from the grant of 1870?

A. Yes; there are such schedules attached.

Q. What is the character of the base assigned in those exhibits?

A. The base is all mineral.

Q. How was the mineral base established?

A. It was, the majority of it, is mineral base established because of the Classification Act of 1895 and there are a few small items in here covered by mineral tracts.

1622

Mr. DANLY. The Plaintiff objects to the offer of that exhibit for the same reason as to the Exhibit C.

The COURT. The objection will be overruled and the exhibit will be received in evidence.

NORTHERN PACIFIC EXHIBIT B

(This Exhibit, here received in evidence, is a stipulation that the affidavit of Verner A. Gillis attached thereto may be received in evidence to show the noncoal and noniron character of certain lands described in two tabulations also attached thereto. The schedules referred to list lands as follows:

a. Lands in Minnesota first and second indemnity limits which were obtained by the railway company or railroad company as the result of court decrees.

b. Lands in the grant of 1864 heretofore obtained by an assignment of base from the grant of 1870.

The schedules also show an assignment, tract for tract, of mineral losses occurring in the grant of 1864 in lieu of the losses occurring in the grant of 1870 by which the patented lands were obtained.)

Mr. DAPONTE. Does your other objection relate to the same point, to the other exhibit?

Mr. DANLY. In E, F, and G?

Mr. DAPONTE. No; but the one that has been offered, Exhibit A, are you making the same objection to that?

Mr. DANLY. There is no objection to A.

Mr. DAPONTE. I did not want to waive my objection to this testimony counsel is bringing out; I was just waiting
1623 until he was finished.

Mr. DANLY. The only ones I am objecting to are B and C, so far.

REDIRECT EXAMINATION

By Mr. DAPONTE:

Q. Mr. Schwarm, is it a fact that base had heretofore been used in the case, the same base you are now assigning?

A. I do not think it has heretofore been used in the case; it may have been used in some of the schedules on the Beartooth points which have been withdrawn.

Q. There had been this mineral base established under the Act of 1895 which we have been using in this case?

A. Yes.

Mr. DAPONTE. My point is objecting to any testimony being now elicited because this question, if it is a question, has always been available to the plaintiff in this case and they never have made the contention they are now advancing and it is my position that after the record is closed and the decree is presented they cannot amend their record or improve it or change it.

The COURT. If it is necessary, the Court will have it—I will allow it to stay in.

Mr. DAPONTE. That is satisfactory, I simply wanted to show my position, objecting to their attempt to amend their record as to points that were available in the case.

Q. I call your attention to Northern Pacific Exhibit D, and ask you to state what that is?

A. Northern Pacific Exhibit D is a schedule of lands in the state of Montana which is patented to the Northern Pa-
1624 cific Railway Company as place lands but which now fall within the first indemnity limits of the grant loss in correction of the Montana land limit as found by the Master, and the Northern Pacific Railway Company is now offering mineral base to support those patented lands. It also includes certain offers of base for base originally used by the company as place lands which fell within the first indemnity limits of the grant of the same correction.

Q. That is the exhibit referred to in our proposed findings, page 42, under the heading "Montana Place Limits Error", too, the Government, I believe, has an exhibit to offer under that finding, have they?

A. Yes.

RECROSS EXAMINATION

By Mr. DANLY:

Q. Mr. Schwarm, is any part of that base now assigned in that tabulation new mineral base established under the Act of February 26, 1895?

A. On the first page we list 1,839.03 acres of mineral base. Of that there is 602.72 acres classified under the Act of 1895. The balance of the lands have been conceded as mineral by the Northern Pacific.

Mr. DANLY. Then I make the same objection to Exhibit D.

The COURT. Overruled. It will be admitted.

NORTHERN PACIFIC EXHIBIT D

This Exhibit, here received in evidence, consists of three tabulations, the first containing the numerical descriptions of 1,838.96 acres of lands patented to the railroad company or railway company as place lands but which, due to the correction of
1625 the lateral limits in Montana, now fall within the first indemnity limits and showing the desecription of mineral base assigned thereto. The second shows the numerical descriptions of lands aggregating 383.47 acres in the first indemnity limits in North Dakota selected by the company in lieu of lands which were considered as place lands lost to the grant on account of the Crow Reservation of 1868, but which lands, due to the correction of the lateral limits in Montana, now fall within the first indemnity limits and also show non-mineral base offered therefor and the third shows the numerical descriptions of lands in the second indemnity limits in Montana which were selected by the company in lieu of lands which were considered as place lands lost to the grant on account of the Crow Reservation, which said place lands now fall within first indemnity limits of the grant, due to the correction of the Montana 40-mile limit and also show new base offered for said selected lands.

1626 REDIRECT EXAMINATION

By Mr. DAPONTE:

Q. Now, I think we might dispose of Northern Pacific Exhibits E, F, G, and H, together. State what they are and give the exhibit number as you explain each of them.

A. Exhibit E is a schedule of lands within the first indemnity limits of the grant of July 2, 1864 in the states of Minnesota, Montana, Wyoming, Idaho, Washington and Oregon, which were

embraced within the exterior boundaries of Governmental reservations on June 5, 1924 and for which the Railway Company is entitled to compensation under the Act of 1929; Exhibit F is a similar tabulation of lands within the second indemnity limits of the grant of 1864 in the states of Wisconsin, Minnesota, Montana, and Idaho, which were within the exterior boundaries of national forests or other Governmental reservations on June 5, 1924, and for which the Railway Company is entitled to compensation under the Act of 1929; Exhibit G is a similar statement of lands within the mineral indemnity limits of the grant of 1864, in the states of Wisconsin and Minnesota and for which the Railway Company is entitled to compensation. Exhibit "H" is a statement of lands within the first indemnity limits of the grant of 1870, within the exterior boundaries of national forests or other Governmental reservations in the state of Washington, and for which the Railway Company is entitled to compensation.

Q. Did you describe them all?

A. I have described them all.

Q. What is the purpose of those exhibits?

1627 A. The purpose is to list the land for which the Railway Company claims compensation, on lands which are covered by the Act of 1929.

Q. That is, it is a tabulation giving the legal description of lands for which hereafter in the case we will be claiming compensation if this judgment stands?

A. Yes.

Q. Is that all, Mr. Schwarm?

A. I might say, the tabulations contain the legal descriptions of the land and the base assigned to support such indemnity limits.

A. And they have all been checked and submitted to the Government?

A. They have.

Q. And the descriptions are all correct?

A. As far as we know; no objection has been made to them, to the legal descriptions.

Q. Then I guess that is all, is it?

A. Yes.

RECROSS EXAMINATION

By Mr. DANLY:

Q. Mr. Schwarm, when you stated in describing these tabulations separately that they were tabulations of lands to which the Railway Company is entitled to compensation, you meant tabulations of lands to which you claim compensation, did you not?

A. To which we claim compensation, yes.

Q. As to Exhibit E, I call your attention to that, is it not true, the withdrawn lands described in Exhibit E are the same withdrawn lands as described in your Exhibit 144 in the case?

A. They are.

Q. It is likewise true, is it not, that a large part of the losses assigned to the lands in this exhibit are losses arising under
1628 the Classification Act of February 26, 1895?

A. That is correct.

Q. Are the lands, are the withdrawn lands which are described in this exhibit the withdrawn lands with regard to which there was considerable testimony concerning the agricultural character of the lands, at the hearing before the Master?

A. That is correct.

Q. Now, directing your attention to Exhibit F. How much of the loss now assigned in Exhibit F, is loss arising within the area of the Crow Reservation as defined by the treaty of May 7, 1868?

A. I do not know; I cannot give you that figure—I would say possibly—well, I would not be able to ascertain it—it has never been computed.

Q. The loss is described in the exhibit, so it would be a matter of computation?

A. Yes; it is all described; it would just be a matter of taking a machine and adding it up.

Q. My computation of that is 64,170.90, would you say that is or is not substantially correct?

A. I would say it is substantially correct.

Q. How much of the loss assigned to withdrawn lands in the second indemnity limits is prior loss?

A. I would say about 51,000 acres.

Q. That also is shown in the exhibit itself, is it?

A. It is.

Mr. DANLY. I think that is all. As soon as the offer is made. I want to make my objection.

The COURT. Are you offering these?

1629 Mr. DAPONTE. Yes; E, F, G, and H.

Mr. DANLY. Then the Plaintiff, consistent with its exception to the ruling of the Court on October 3, 1935, striking its amended bill of complaint, objects to the receipt in evidence of the Exhibits E, F, G, and H, and objects severally for all the reasons which Plaintiff has heretofore urged, why Defendants should not have compensation on account of withdrawn lands described therein, and for the further reason Defendants have not shown that they or any of them would have been able to select any of the withdrawn lands described in the exhibits even if they had not been withdrawn, since such lands might have been obtained by others for settlement.

The COURT. The objections will be overruled and the exhibits will be admitted. The objections may be understood as going to each exhibit severally and overuled as such.

NORTHERN PACIFIC EXHIBITS E, F, G, AND H

Northern Pacific Exhibit E, here received in evidence, is a schedule containing the numerical descriptions of lands, aggregating 1,103,424.19 acres, within the first indemnity limits of the grant of July 2, 1864, embraced within the exterior boundaries of national forests or other governmental reservations on June 5, 1924, on account of which the Northern Pacific Railway Company claims to be entitled to compensation from the United States under the provisions of the Act of June 25, 1929 (46 Stat. 41). The lands described in Northern Pacific Exhibit 144 are included in this schedule. The schedule also shows, tract for tract, an assignment of mineral base aggregating 1,021,695.73 acres, a large part of which arose under the Classification Act of February 26, 1895, and of nonmineral base aggregating 82,350.70 acres.

Northern Pacific Exhibit F is a schedule containing the
1630 numerical descriptions of 193,753.32 acres of lands within the second indemnity limits of the Grant of 1864 in the States of Wisconsin, Minnesota, Montana, and Idaho on account of which the railway company claims compensation. Base is assigned, tract for tract. The selected lands are located as follows: 40 acres in Wisconsin, .63 acres in Minnesota, 170,326.73 acres in Montana, and 23,385.96 acres in Idaho. Of the losses assigned to lands in the second indemnity limits in Montana, approximately 51,115.67 acres are prior losses and 64,134.42 acres are losses occurring within the area of the Crow Reservation of 1868. The remainder of the losses assigned are subsequent losses arising from various causes. Of the losses assigned to lands in the second indemnity limits in Idaho, all are Idaho subsequent losses.

The assignment of base is shown by the following tabulation:

MONTANA SECOND

Date of withdrawal	Withdrawn land		Total area of losses assigned	State where loss occurred	Cause of loss in place limits
Mar. 1, 1898	16,480.00		16,491.79	Mont	Flathead Ind. Res.
July 14, 1899	3,209.74		3,204.14	"	" "
Mar. 19, 1900	14,521.60	4,845.51		"	Flathead Ind. Res.
		9,668.03		"	Crow Ind. Res.
			14,513.54		
Dec. 18, 1901	13,961.00		13,948.00	"	Crow Ind. Res.
Aug. 16, 1902	23,553.47	18,524.33		"	Crow Ind. Res.
		5,040.00		"	Flathead Ind. Res.
			23,564.33		

MONTANA SECOND—Continued

Date of withdrawal	Withdrawn land		Total area of losses assigned	State where loss occurred	Cause of loss in place limits
Aug. 24, 1903	80.00		80.00	Mont.	Crow Ind. Res.
Aug. 26, 1903	332.27		335.23	"	Crow Ind. Res.
Oct. 31, 1903	917.80		915.08	"	Crow Ind. Res.
May 12, 1904	7,970.17	1,256.99		"	Crow Ind. Res.
		294.81		"	Fort Missoula Tbr. Resn.
		6,424.61		"	Private Entries Subsequent.
			7,976.41		
Sept. 20, 1904	3,109.50		3,116.41	"	Private Entries Subsequent.
1631					
Oct. 3, 1905	31,780.21	15,284.89		Mont.	Private Entries Subsequent.
		7,534.63		"	Bitterroot Valley I. R.
		819.98		"	Ft. Keogh Mil. Res.
		8,120.00		"	Flathead Ind. Res.
			31,759.50		
Apr. 12, 1906	157.35		160.00	"	Fort Missoula Mil. Resn.
Sept. 17, 1906	498.05		498.39	"	Fort Keogh Mil. Resn.
Sept. 18, 1906	2,790.60	1,153.01		"	Fort Ellis Mil. Res.
		153.41		"	Fort Keogh Mil. Res.
		520.00		"	Private Entries Subsequent.
		960.00		"	Camp Baker Mil. Res.
			2,786.42		
Oct. 9, 1906	465.56	220.92		"	Camp Baker Mil. Res.
		27.47		"	Fort Keogh Mil. Res.
		230.00		"	Private Entries Subsequent.
			478.39		
Nov. 5, 1906	19,978.49	11,351.79		"	Crow Ind. Res.
		6,822.15		"	Private Entries Subsequent.
		720.00		"	Fort Missoula Mil. Resn.
		560.32		"	Fort Missoula Tbr. Resn.
		526.84		"	Fort Keogh Mil. Res.
			19,981.10		
Nov. 6, 1906	1,483.13	320.00		"	Private Entries Subsequent.
		1,161.75		"	Crow Ind. Res.
			1,481.75		
Mar. 2, 1907	19,735.08	4,326.40		"	Crow Ind. Res.
		15,412.11		"	Private Entries Subsequent.
			19,738.51		
Apr. 19, 1912	1,117.02	251.32		"	Private Entries Subsequent.
		871.58		"	Crow Indian Reservation.
			1,122.90		
Mar. 18, 1918 [1]	602.84		600.00	"	Private Entries Sub.
Aug. 16, 1902 [2]					
Oct. 9, 1917 [2]	6,940.23	1,055.24		Mont.	Crow Ind. Res.
		5,880.00		"	Flathead Ind. Res.
			6,935.24		
Nov. 5, 1906 [2]					
June 10, 1912 [2]	640.00		639.91	Mont.	Crow Ind. Res.

[1] "Surface Value only; Phosphate reserved to the United States under the Act of July 17, 1914 (38 Stat. 509)."
[2] National Forest Phosphate.

1632 Northern Pacific Exhibit G is a schedule of 180.25 acres of lands within mineral indemnity limits of the Grant of July 2, 1864, embraced within the exterior boundaries of national forests or other governmental reservations on June 5, 1924, for which the Northern Pacific Railway Company claims to be entitled to compensation from the United States under the provisions of the Act of June 25, 1929 (46 Stat. 41). The tabulation shows the numerical descriptions of 40 acres in Wisconsin and of 140.25 acres in Minnesota. It also shows 140.20 acres of mineral losses assigned to the Minnesota lands of which 120 acres are mineral losses growing out of the classification made under the Act of February 26, 1895.

Northern Pacific Exhibit H is a schedule of 155,727.84 acres of lands within the first indemnity limits of the Grant of May 31, 1870, embraced within exterior boundaries of national forests or other governmental reservations on June 5, 1924, for which the Northern Pacific Railway Company claims to be entitled to compensation from the United States under the provisions of the Act of June 25, 1929 (46 Stat. 41). The schedule shows a tract for tract assignment of losses to such indemnity lands.

1633 Mr. DAPONTE. If Your Honor please, I prepared Findings of Fact——

Mr. DANLY. (Interposing.) If the Court please, I ask Mr. Barber to take the stand. Mr. Barber was sworn to testify before the Master.

ABE BARBER, called as a witness in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. DANLY:

Q. Mr. Barber, I hand you Government's Exhibit A, and ask you to state what that is?

A. This is a schedule of lands in the second indemnity limits in Montana, selected by the Northern Pacific Railroad Company in lieu of lands located within the primary limits of the grant, as said limits were formerly laid down, but which primary land, due to correction of the primary limits now fall in the first indemnity limits, and showing the descriptions of the lands used as base for such selection.

Mr. DANLY. Plaintiff offers in evidence, Plaintiff's Exhibit A.

The COURT. That will be admitted.

GOVERNMENT EXHIBIT A

This Exhibit, here received in evidence, is a schedule showing the following:

a. the numerical descriptions of lands aggregating 3,320.28 acres in second indemnity limits in Montana which were selected by the railroad company or railway company in

1634 lieu of lands within the primary limits of the grant, as said limits were formerly located, which primary lands, due to the correction of the primary limits of said grant, now fall within the first indemnity limits, and also showing the descriptions of lands used as base for such selections.

b. the numerical descriptions of lands in Montana aggregating 1,838.96 acres, patented to the Railroad Company or Railway

Company as place lands, which lands now fall within the first indemnity limits of the Grant of July 2, 1864, due to the correction of the primary limits, and,

c. the numerical descriptions of lands, aggregating 383.47 acres, in first indemnity limits in North Dakota selected by the Railroad Company or Railway Company in lieu of lands located within the primary limits of the grant as said limits were formerly located, but which primary lands, due to a correction of the primary limits, now fall within the first indemnity limits and also showing the descriptions of lands used as base for such selections.

The lands described are the lands to which new base is assigned in Northern Pacific Exhibit D.

The CLERK. Government's Exhibit A.

Q. I hand you now, Government's Exhibit B, and ask you to state what that is?

A. Government's Exhibit B is a schedule of lands found to be mineral upon the concession of the Northern Pacific Railway Company before the Master, that the lands are of such character.

Mr. DANLY. I will say to Your Honor, the purpose of this exhibit is to bring together in one tabulation, lands which are conceded to be mineral, and which appear in numerous
1635 places throughout the record. It is for the convenience of Court and counsel.

The COURT. It is nothing new then, it is just a tabulation of matter already in?

Mr. DANLY. Yes, sir.

GOVERNMENT EXHIBIT B

(This Exhibit, here received in evidence, is a schedule of lands found, upon concession of the defendants, to be mineral in character.)

Q. I now hand you Government's Exhibit C, and ask you to state what that is?

A. Government's Exhibit C consists of two tabulations. One is a schedule of lands within the exterior boundaries of national forests, also included in phosphate or petroleum reserves for which the company claims compensation under the Act of June 25, 1929, for surface rights only, in accordance with the Act of July 17, 1914.

Mr. DANLY. Plaintiff now offers in evidence, Government's Exhibit C.

The COURT. Any objection? Let it be admitted.

A. (Continuing.) The other tabulation, that is descriptive only of the first tabulation. There are two tabulations involved in this exhibit.

The COURT. Go right ahead.

A. (Continuing.) The other tabulation is a schedule of lands charged to the company under the grant, but not patented, for which said company claims the right to receive patent with a reservation to the United States, as provided for under the Act of July 17, 1914.

1636 Q. Are both tabulations included under the same exhibit number?

A. They are, both tabulations.

The COURT. Let the exhibit be admitted in evidence.

GOVERNMENT EXHIBIT C

(This Exhibit, here received in evidence, contains the numerical descriptions of lands involved in the suit which are within wthdrawals for phosphate or petroleum.)

Q. Mr. Barber, I hand you now, Government's Exhibit D, and ask you to state what that is. If you can speak a little more rapidly we will save some time.

A. Government's Exhibit D is a statement showing use of Montana prior non-mineral losses as base for indemnity selections by the Northern Pacific Railway, now Railroad, year by year.

Mr. DANLY. Plaintiff now offers in evidence, Government's Exhibit D.

The COURT. Let it be admitted.

GOVERNMENT EXHIBIT D

(This Exhibit, here received in evidence, shows the gross area of Montana prior loss as being 730,175.11 acres. It shows the unused balance at the end of each year as follows:

1893	691, 752. 46	1911	111, 595. 96
1894	691, 752. 46	1912	107, 119. 91
1895	649, 784. 32	1913	106, 719. 91
1896	642, 228. 09	1914	49, 675. 06
1897	636, 356. 16	1915	51, 065. 99
1898	586, 851. 01	1916	52, 706. 73
1899	586, 851. 01	1917	47, 358. 67
1900	322, 921. 77	1918	46, 672. 30
1901	283, 578. 61	1919	51, 234. 12
1902	381, 302. 66	1920	52, 274. 12
1903	352, 531. 50	1921	56, 042. 58
1904	270, 589. 14	1922	56, 122. 58
1905	280, 320. 71	1923	56, 285. 07
1906	161, 555. 08	1924	56, 285. 07
1637 1907	158, 474. 27	1925	56, 285. 07
1908	142, 634. 92	1926	56, 245. 07
1909	143, 194. 92	1927	56, 354. 11
1910	141, 674. 92	1928	56, 274. 11

Q. Mr. Barber, I hand you now, Government's Exhibit E, and ask you to state what that is?

A. Government's Exhibit E is a tabulation showing the vacant land in the second indemnity limits in Montana as of December 31, 1897, subsequently classified as mineral lands.

Mr. DANLY. Plaintiff offers in evidence, Government's Exhibit E.

The COURT. Let it be admitted.

GOVERNMENT EXHIBIT E

This Exhibit, here received in evidence, shows a total area of 374,862.73 acres of vacant lands in the second indemnity limits in Montana as of December 31, 1897 classified, or otherwise determined to be, mineral subsequent to that date. The areas classified as mineral during each year are as follows:

1898	29,847.29	1914	66.63
1899	800.00	1915	2,388.41
1900	5,206.22	1916	244.96
1901	14,223.81	1917	1,159.45
1902	36,763.58	1918	(none classified)
1638 1903	157,563.58	1919	" "
1904	54,438.25	1920	5.24
1905	53,742.37	1921	10.32
1906	98.08	1922	45.00
1907	(none classified)	1923	120.00
1908	" "	1924	(none classified)
1909	" "	1925	" "
1910	" "	1926	111.83
1911	" "	1927	(none classified)
1912	194.38	1928	17.92
1913	10,374.00	1929	129.85

Q. Please state what Government's Exhibit F is?

A. Government's Exhibit F is a statement showing vacant lands in the second indemnity limits of the grant in the state of Idaho, vacant lands as of December 31, 1897, subsequently classified as mineral.

Mr. DANLY. Plaintiff now offers in evidence Government's Exhibit F.

The COURT. Let it be admitted.

GOVERNMENT EXHIBIT F

This Exhibit, here received in evidence, shows a total of 33,841.43 acres of lands in the second indemnity limits in Idaho which were vacant on December 31, 1897, and which were sub-

sequently classified or otherwise determined to be mineral. The statement shows areas classified during each year as follows:

	1898	320.00		1908	33.87
1639	1899	3,680.00		1909	(none classified)
	1900	9,548.25		1910	394.60
	1901	16,532.78		1911	(none classified)
	1902	11.93		1912	" "
	1903	(none classified)		1913	" "
	1904	3,200.00		1914	120.00
	1905	(none classified)			
	1906	" "			
	1907	" "			

Q. Mr. Barber, can you state to the Court the amount of losses in Montana arising by reason of the Crow Reservation as defined by the treaty of May 7, 1868?

Mr. DAPONTE. I do not know what the purpose of that is, this testimony you are now referring to; the point is, I am objecting to any additions to the record, raising questions not heretofore presented in the case. Until I am sure that objection does not apply, I want to urge it.

Mr. DANLY. They have now offered their Exhibit F, in which they are claiming compensation for approximately 170,000 acres of lands in the second indemnity belt in Montana. Testimony shows that a large part of that land is claimed upon loss arising within the area of the Crow Reservation of 1868. I just want to bring out those facts. We have heretofore made the contention to Your Honor that those losses are prior losses and not subsequent losses. On that, both the Master and Your Honor ruled against us, but now that they submit this new tabulation, counsel for the Government feel that we ought to make our record on that, too.

Mr. DAPONTE. I do not want to prevent counsel from
1640 doing anything that meets any new matter arising out of these settlements. We have made our proof of what was done by the Court's rulings, and the settlements show, if I understand it correctly, this matter has always been in the case; we have always made the same use of these lands we now make of them. This testimony could have been put in during the progress of the case.

Am I right about that, Mr. Danly?

Mr. DANLY. So far as it relates to the exhibit now offered in evidence, it could not have been put in prior to this time. This is the first opportunity we have had to do it and we feel we should make our record on it.

Mr. DAPONTE. The fact is this—and I suppose it will be conceded—we used those losses in our Exhibit 145, and if they were to be objected to for any reason, I do not see any reason why the

objection should not have been made then and not now. We do not want new questions in the case all the time.

The COURT. No; I do not either.

Mr. POPE. If the Court please, Exhibit F presents an entirely new claim with respect to the lands tabulated in it as being within the withdrawals. It comes now as a new basis for claim of which 170,000 acres in Montana, for instance, which originally were sought by the Railway Company on the basis of their claim of substitution of losses; in other words, their exhibits, as the case was tried to the Master with respect to these classification lands, were based on a substitution of base, and on that the Court has held the substitution of base was improper and therefore the ground work for the original claim was cut away. Now, counsel come in and bring in this entirely new set-up; it is an entirely new approach, the Court having held that their former assignment of base to these particular lands was

1641 not proper by reason of the rule, on the substitution point, counsel now come in with a new assignment of base for these claims which is based on an entirely new proposition, that is to say, it is based upon new base not related to old, based on substitution point. Now, it is also novel in other respects, if the Court please. When the case was tried before the Master, all the exhibits by both parties were put in upon the theory that lands to be selected in second indemnity must be based upon subsequent losses, and that prior loss could not be assigned as base. I say, the exhibits were made up on that theory. All of the parties tried the case as though that were the rule. The Master held, and it may be correctly, but he held upon more or less his own initiative, that not only subsequent loss but prior loss might be assigned in second indemnity and this exhibit has been made up, taking advantage of that ruling. The former exhibits did not purport to assign prior loss. Now, in view of this ruling, which we say, as far as the Government was concerned, took us by surprise, that is to say, it was not anticipated, in view of the theory upon which the case was tried, finds us confronted, when this Exhibit F comes in, with an entirely novel situation. Their first claim has been denied. They come in with a new claim, with new base, and it is also based upon a new theory of the Master's, of which we are not now complaining, that prior loss might also be assigned. Now, if that be the rule, then in order that the Government be permitted to preserve this point, with respect to this exhibit, it is necessary that we show what the facts are for the application of the Master's rule, namely, what was the aggregate amount of subsequent losses in Montana, including those Crow losses as subsequent losses, and how much of that aggregate amount was loss

1642 other than Crow. Unless we are allowed, if the Court please, to perfect our record on that, we are found without a record, as far as this point is concerned, because, as I say, the case before was tried upon the theory that prior loss would not be available for selection of second indemnity.

We are not, Your Honor, trying to urge anything new. We are merely trying to preserve our record on this new exhibit with respect to a point which the Government has tried to present at all times.

The COURT. The objection will be overruled, and the exhibit will be received in evidence.

Mr. DANLY. Read the question, please.

REPORTER. "Q. Mr. Barber, can you state to the Court the amount of losses in Montana arising by reason of the Crow Reservation as defined by the treaty of May 7, 1868?"

The COURT. You may answer.

A. The total subsequent loss in Montana, 2,636,204.53 acres.

Q. Mr. Barber, is that the total considering the Crow Reservation losses of 1868 as subsequent losses?

A. Yes; of this amount there are 2,434,082,80 which are Crow losses.

The COURT. Any further examination of this witness? That is all, you may step down.

The CLERK. Mr. Danly, there was no exhibit marked for this last testimony?

Mr. DANLY. No.

The transcript shows that, following the taking of the foregoing testimony and the presentation of certain motions and requests for findings and conclusions, more fully appearing in the pleadings on file in the cause, counsel for defendants presented proposed findings and conclusions for the approval and signature of the court. Thereupon a col'oquy between the court and counsel, in part as follows, took place:

Colloquy

1643 Mr. DAPONTE. Your Honor, I prepared the Findings. I take it, as I see this matter, we must be considered the prevailing parties, and therefore assumed the burden of preparing the Findings and Decree and we have discussed them for about a year, or almost a year, with counsel for the other side. We agreed to a very large part, and the balance, where we have not agreed, I will undertake, as the prevailing party, to assume the duty to present to Your Honor the findings which I think are required by Your Honor's rulings on the Master's report.

The COURT. Will counsel then call attention to——

Mr. DAPONTE. Page 2 in the introductory statement. I do not know that this is a part of the Findings, even, but I think we have made a correct recitation of the preliminary facts leading up to the Findings proper. It recites the full disposition, you will note, of all the issues, the principal rulings of the Court, or by stipulations entered into. The draft the Government gives us is about the same in substance as this. There will be no need for any change, merely a matter of wording, except that it provides that the Court adopts the Master's report in all of the particulars except to which exceptions were overruled; that in itself is improper, because if it goes outside of the phase of the Findings, it would require reference to other documents, and there might be a difference of opinion as to what exceptions were overruled or sustained in all particulars. I do not think it is proper. The Court ought either to adopt the findings of the Master, or should not adopt them. I think that is misleading. As a matter of fact, when the Government went on to make specific findings, it did not adopt the Master's findings in toto where exceptions had been overruled. It undertook to crawl out from the Master's findings.

The COURT. I made some findings of my own, and made 1644 reference to those of the Master.

Mr. DAPONTE. Even where your Honor overruled all objections to the Master's report, he did not adopt them slavishly or verbatim so I think that is misleading. We simply have been unable to get together on the general findings contained on page 1, beginning with Finding C.

The COURT. On page 1?

Mr. DAPONTE. Page 3 of the Findings, paragraph 1; the findings A and B are the same.

Mr. DANLY. May I interrupt, just to make a suggestion. I think we might simplify this for the Court and everyone, if, when we come to a matter on which there is a controversy, Your Honor might hear both sides.

The COURT. Yes.

Mr. DANLY. You have just passed one on which I think Your Honor should hear and pass on—I think it would make it easier.

The COURT. All right.

Mr. DANLY. On this preliminary statement, it is just a recital which conforms, as we think, to the rules. It is just a little different, and it is not, perhaps, awfully material, but we think ours more correctly states the facts: "This cause came on further to be heard upon a review of the report of the Special Master, Hon. Frank H. Graves, filed July 26, 1937, and on exceptions filed thereto, an order on such exceptions having been entered herein on March 22, 1938, such testimony as became necessary to complete such report was received by the Court." I may say, we

used that language, "to complete such report was received by the Court," to conform with the new statute which authorizes the review of the report of the Master; that is the reason for
1645 taking that language, to have it in the language of the special appeal statute. "The parties hereto have entered into a stipulation dated March 23, 1939, for the settlement of certain issues which were not determined by said order or the said exceptions." There is no controversy on that; I think that is exactly the same as theirs; I am sure they would have no issue on that. Ours reads, "For the purpose of complying with the requirements of rule 52 of the Federal Rules of Civil Procedure, the Court having ruled on various motions of the Plaintiff and Defendant to the report of the Special Master, hereby adopts and approves the report of the Master as to which such exceptions are overruled or to which no exceptions were taken."

The COURT. I will say here, I am not going to sign any such order. The Findings and Conclusions that are made here are mine. I am making the Findings right now. If there are any in the Master's report that are not included here, and that you think should be included, you call them to my attention. I am making the Findings and Conclusions now.

Mr. DANLY. If Your Honor will bear with me a minute, I will have something to say to that—"The Court having sustained certain parts of the Master's report, makes its own Findings with respect to the Master's Findings."

The COURT. At this stage of the proceeding, the Findings and Conclusions of the Master's report are not my concern; I have heard this case, and I am making the Findings on my own responsibility; I am not going to slavishly follow the Master's report. If there are any Findings of the Master appropriate to these Findings, they can be presented, but I am not going to follow any pernicious approval here—a noise in the dark.

1646 In United States District Court

[Title omitted.]

[File endorsement omitted.]

Motion to strike certain matter from and to supplement appellant's narrative statement of evidence

Filed Aug. 21, 1939

Appellees Northern Pacific Railway Company et al. move under Supreme Court Rule 10 and Rules of Civil Procedure 75 (e) and (h) to correct and strike from narrative statement submitted by appellant, the following portions:

1. All that portion of said proposed narrative statement which relates to the so-called Tacoma Overlap point, beginning with

Government Exhibit 66 on page 184 and ending with the quotation from letter on page 199; all of pages 218 to 226 inclusive; page 241 beginning with the last question and all of page 242; page 244 beginning with the words, "I have prepared a diagram map," in the second paragraph and ending with the first paragraph on page 245; page 254 beginning with the words "Northern Pacific Exhibit 139" and ending with the words "a total of 1,394.02 acres," on the same page; page 256 beginning with the words in the second paragraph, "I have shown circled in green,"
to bottom of page; page 257 except last paragraph; page
1647 265, last paragraph beginning with the heading, "Second
Indemnity Limits"; last paragraph on page 266 and to middle of page 267; all of page 268 except first two lines; page 390 beginning with the tenth line, down to the words, "By the witness," on page 391; pages 400 and 401 down to the words, "By Mr. Frost: At page 2529 of Volume 3," on page 401.

2. Appellees state that all of said matter relates to the so-called Tacoma Overlap point which was decided in favor of the United States and from which the United States has not and cannot appeal, and is irrelevant and immaterial to the appeal of the United States; that defendants have appealed from the judgment of said court on said point and have included in their narrative statement of the evidence all of said matter that is material to defendants' appeal, and if the United States deems said narrative statement of the evidence is incomplete and incorrect, same can only be corrected and supplemented by proposing additions or corrections in defendants' said narrative statement, as provided by the rules.

3. Appellees show that the statement, "By Mr. Danly," in the middle paragraph of page 204 is incomplete and if used at all, defendants ask that it be supplemented as follows:

"By Mr. DANLY. Under the joint resolution of May 31, 1870, by which the so-called grant of 1870 was made, there was a provision for the laying down of second indemnity limits under certain conditions, which are detailed in the resolution. Our interpretation of the terms of that resolution is that if should appear on the date of final location of the road in any given state that the area of vacant lands in the first indemnity limits exceeded the total of the losses in existence in the primary limits as of that date, then there was no authority for the laying down of a second indemnity belt; and the second indemnity belt was authorized only when it appeared that the losses in the primary limits at time of final location of the road in the state exceeded the available area in first indemnity limits" (297–8).

1648 "Mr. DANLY. I want to supplement that statement a little further. In offering plaintiff's exhibits with reference to

the grant of 1870 they are all offered showing the status, assuming that there did exist authority for laying down the second indemnity belt. The reason for doing that was because the changing of the tabulations, the first statement and the tabulations which would follow, leaving out of them entirely any reference to the second indemnity belt, would add confusion to the Government's position; the Government's position being at all times that there was no justification for laying down a second indemnity belt; that it was wholly unauthorized, and that the comparatively small area of lands which have been patented under the grant in the second indemnity belt was erroneously patented and should be compensated for. The acreage is 1,191.59 acres patented, and 200 acres selected, making a total of 1,391.59 acres.

"Mr. FROST. Was that relief asked for in the amended complaint?

"Mr. DANLY. No; it was not.

"Mr. FROST. So it is not until this time that it has been the position of plaintiff that the railway company had no right to these 1,300-odd acres in the second limits?

"Mr. DANLY. That is not true. We have taken the position all the time, as the records will show, that the second indemnity belt in the State of Washington was unauthorized. However, in the drafting of the bill of complaint, which of course was a tremendous job, we did not include as an item among the losses that we were asking compensation for, lands which we claim were erroneously patented in the grant of 1870 in the second indemnity belt in the State of Washington (299–300)."

4. Appellees move that there be added at the conclusion of the examination of appellant's witness Barber at page 222 of the narrative statement the following page, to be numbered 222½:

"The MASTER. Now, are you resting?

"Mr. DANLY. Yes" (557).

and that the following appearing at Tr. 562 after the words, "Discussion off the record", be added:

"Mr. LYONS. I understand you have rested?

"Mr. DANLY. Yes; we rest."

1649

L. B. DAPONTE,
F. J. MCKEVITT,
D. R. FROST,
Attorneys for Appellees Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company.

WHITE & CASE,
Attorneys for Appellee Bankers Trust Company.

TAYLOR, BLANC, CAPRON & MARSH,
Attorneys for Appellee City Bank Farmers Trust Company.

1650 In United States District Court for the Eastern District of Washington, Northern Division

[File endorsement omitted.]

In Equity No. E–4389

UNITED STATES OF AMERICA, PLAINTIFF

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION; NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION; NORTHERN PACIFIC RAILROAD COMPANY, AS REORGANIZED IN 1875; NORTHWESTERN IMPROVEMENT COMPANY, A CORPORATION; BANKERS TRUST COMPANY, A CORPORATION; GUARANTY TRUST COMPANY, A CORPORATION; CITY BANK FARMERS TRUST COMPANY, A CORPORATION, DEFENDANTS

Narrative statement of evidence.

Filed Aug. 21, 1939

The following is the condensed narrative statement of appellants, Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company, Bankers Trust Company, and City Bank Farmers Trust Company, pursuant to Rule 75, paragraph (c) of Federal Rules of Civil Procedure, of all the testimony received and proceedings had in the District Court essential or material to a decision of the questions presented by their appeal:

1651 Defendants offered in evidence N. P. Exhibit 131 (Tr. 568), a map, which shows the date of last definite location of the line of railroad from Portland to Puget Sound authorized by the Joint Resolution of May 31, 1870, was September 22, 1882. That portion of the line from Tenino to Tacoma was definitely located on May 14, 1874. That portion from Kalama to Tenino was definitely located September 13, 1873. Construction was completed August 22, 1883.

Said N. P. Exhibit 131 shows that the line from Pasco to Tacoma, Washington, was definitely located between Yakima River near Swauk Creek and Tacoma in 1884.

Abe Barber, a witness for plaintiff, testified (Tr. 36 et seq.) that upon filing maps of definite location the Commissioner of the General Land Office immediately transmitted the diagrams to the register and receiver of the District Land Office where the lands lay, together with an order withdrawing all odd-numbered sections in place and first-indemnity limits of the grant from sale, entry, or preemption. Upon filing maps of definite location of constructed road for said line from Portland to Tacoma said diagrams were made and filed.

N. P. Exhibit 142, a map, was identified and introduced in evidence by defendants' witness Louis L. Schwarm (Tr. 661) Said map shows the terminals for the line from Portland to Tacoma at both points; that the north terminal line for the grant of 1870 runs in a general east and west direction through Tacoma perpendicular to the line of definite location. It
1652 shows that place limits in Washington were laid down forty miles and first indemnity limits fifty miles from the line of definite location on both sides of said definitely located and constructed line. These lines are in blue and identified by appropriate legends.

Said N. P. Exhibit 142 shows by a red line, identified by appropriate legend, the terminus of the Cascade Branch at Tacoma. The Cascade Branch terminal line runs in a general north and south direction through Tacoma. Lateral limits for the grant of 1864 are also shown on said map by red lines, identified by appropriate legend.

The Cascade Branch and the Tacoma-Portland line met at Tacoma to form a right angle. Defendants' witness Schwarm testified that the area known as the Tacoma Overlap is the area southeast of Tacoma, identified on said N. P. Exhibit 142 by the letters A, B, C, and D in red ink. Said map is correct. The area of the odd sections contained in said Overlap is 637,580.99 acres. Plaintiff's witness Barber (Tr. 288) testified that a description of said overlapping area is as follows:

"Beginning at the City of Tacoma, at the intersection of the terminal lines for the two grants, thence southwesterly along the terminal line for the grant of 1864 to its intersection with the place limits line for the grant of 1864, thence along said place limits line to its intersection with the place limits line for the grant of 1870, thence north along said last named place limits line to its intersections with the terminal line for the grant of 1870, thence along said last named terminal line to the points of begin ng."

N. P. Exhibits 25, 25-a are certified copies of record, decree, and decision in the Supreme Court of the United States in the case of Northern Pacific Railway Company v. DeLacey,

1653 174 U. S. 622. In that case the Supreme Court decided that the line from Pasco, Wash., to Tacoma, Wash., was constructed and the grant of lands therefor made and earned under the Act of July 2, 1864. (Hearing on Adjustment, Tr. 674).

Defendants offered N. P. Exhibit 26 (Tr. 675), certified copy of the record in case No. 600 in the Circuit Court of the United States for the District of Washington, Western Division, entitled United States, Plaintiff, v. Northern Pacific Railroad Co. et al. The record in this case shows that it involved the same question and the same lands as were involved in the DeLacey Case. After the decision in that case, cause No. 600 was dismissed by the United States.

N. P. Exhibit 20 (Tr. 674), certified copy of record in the Portland Overlap Case, 193 U. S. 1, shows that the Supreme Court held and adjudicated that the line from Portland to Tacoma was authorized and constructed and the grant therefor made and earned under the Joint Resolution of Congress of May 31, 1870.

Plaintiff's witness, Barber (Tr. 1413-1414), testified that of the area of the odd sections within said overlap there were patented to the Railroad Company 537,684.14 acres as place lands earned under the Act of July 2, 1864; 65,615.89 acres were relinquished under exchange acts and charged to the 1864 grant; 1,926.10 acres were listed by and charged to the company under the 1864 grant for which patent has not yet been but will be issued; the remaining 32,354.46 acres were lost to the grant of 1864 for one or another of the reasons specified in Section 3 of said act, but the railroad company received indemnity for a portion
1654 thereof. He further testified that he could find no record of a selection list filed by the company using as base any of the lands above enumerated charged to the grant of 1864 in support of indemnity selections under the 1870 grant.

Defendants' witness Schwarm testified on redirect examination (Tr. 1470) as follows:

"Q. Now, yesterday some testimony was given to the effect that the railway company in the grant of 1870 never attempted to use losses in the Tacoma Overlap that arises from the grant of lands by the Act of 1864, and that were earned by the construction of the branch line, to use those losses for base in making indemnity selections in the grant of 1870. What are the facts as to the amount of losses in the grant of 1870 on hand and the amount of available surveyed land for selections in satisfaction of those lists?

"A. The railway company has always had on hand a large amount of losses in the grant of 1870—a great deal larger than

an amount of vacant surveyed indemnity lands which we could select.

"The MASTER. That is, you had more bases than available selections.

"A. We always had a great deal more bases than available indemnity selections.

"Q. There was a statement made yesterday that the Tacoma Overlap was an afterthought—what have you to say about that?

"Judge BIGGS. May it please the Court—that I don't think is necessary: Your Honor asked me a question——

"Mr. FROST. I want to get at it in as short a way as possible, and he has been in the Department since 1910.

"Q. Now, tell us what you did about it.

"The MASTER. You mean about using it—why they did or didn't use the overlap as base?

"Mr. FROST. He has stated there was always a disproportionate amount of losses on hand——

"The MASTER. That may be so—do you mean you want him to tell us why they didn't use the overlap?

"Mr. FROST. No, whether the railway company, during the time he has been in this land department, starting with 1910, didn't always deem the Tacoma Overlap as a loss.

"Judge BIGGS. I object to that. What they may have 'deemed'——

"Mr. FROST. The statement was made yesterday it was purely an afterthought.

"The MASTER. That was by way of argument—I am not sure but what it was an off the record discussion. Now, Gentlemen, it gets to a perfectly plain proposition—either that the Tacoma Overlap, as a matter of law is a loss, or it isn't. I don't think it makes a bit of difference whether it's a forethought, or afterthought, or a middle thought—what they deemed in the Land Department of the Northern Pacific Railway, or anywhere else—that it is a pure and simple question of law.

"Mr. FROST. I will not press that question."

1655 Defendants' witness Schwarm identified N. P. Exhibit 142, a map of Tacoma Overlap area (Tr. 660). The witness testified that he has shown circled in black on said exhibit certain lands within the Overlap which were lost to the grant of 1870 because of private entries and which were used by the Railway Company in making selections in first indemnity limits within the grant of 1870 (Tr. 663). Witness testi-

fied he has shown in red circles the lands selected in the first indemnity limits of the 1870 grant with some of the losses shown in black circles; that he has shown circled in green areas within the first indemnity limits of the grant of 1870, which area also falls within the first indemnity limits of the grant of 1864, and were selected in lieu of some of the lands circled in black. The lands circled in green were selected in Olympia list 28 and Vancouver list 41 and designated as a list of indemnity lands for that portion of the line from Kalama to Tacoma. In the tentative adjustment of December 31, 1921, and in the report to Congress of March 5, 1925, the lands shown circled in green are shown as charged to the grant of 1870 (Tr. 664).

1656 Schwarm testified further on cross-examination (Tr. 774–777) that the lands which were taken by settlers were circled in black, the lands selected in the first indemnity limits of the grant of 1870 were circled in red, and that the lands on the east side of the line were shown in green. The lands circled in green were in the indemnity limits of both grants. The decision of the Secretary of the Interior in 25 L. D. 511 was handed down December 20, 1897. It held that the two grants had to be administered separately. Prior to that time losses under the 1864 grant were used to take lands in the 1870 grant and vice versa (Tr. 778). The Olympia list was filed October 25, 1887 (Tr. 782). Vancouver list was filed October 27, 1891. It was for a forty-acre tract. The Vancouver list was not approved by the Commissioner because of conflict with settlers, and the 40 acres were relinquished under provisions of the Act of July 1, 1898. There were two other lists filed in the indemnity limits shown to the west in red circles on N. P. Exhibit 142. They were for 208.50 acres. 168.50 acres is listed in Olympia No. 5, filed February 25, 1885, and the indemnity lands were relinquished under provisions of the Act of July 1, 1898. The

1657 other 40 acres was selected in Chehalis list 61, which was filed January 30, 1903, and patented to the Railway Company. All but 40 acres were filed ten years or more before the decision in 25 L. D. All of the lands in those lists were lost to settlers (Tr. 785).

Plaintiff's Exhibit 206, identified and introduced by its witness Barber (Tr. 302), is a statement showing status of the grant of 1870 and the land within indemnity limits on date of definite location within the State of Washington and depletions from year to year to December 31, 1935. As shown by said Plaintiff's Exhibit 201 Revised and said Exhibit 206, at date of final

location of said Portland-Tacoma line September 22, 1882, the status of the grant of 1870 in Washington was as follows:

		Acres
Area of place limits (40 sections per mile):		
(a) excluding area of Tacoma Overlap		1,761,912.26
(b) including area of Tacoma Overlap		2,399,493.25
Chargeable to grant in primary limits	1,368,109.16	
Vacant (surveyed and unsurveyed) in first indemnity limits	432,509.79	
		1,800,618.95
Deficiency in Washington (including Tacoma Overlap)		598,874.30
Excess of vacant lands in first indemnity limits over losses in Washington (excluding Tacoma Overlap)		38,706.69

Defendant's witness Schwarm testified (Tr. 653) that there are only 750 acres of land classified as mineral in the entire indemnity belt of the grant of 1870, of which only 480 acres were surveyed on December 31, 1897.

On said N. P. Exhibit 131 the legend shows and witness Schwarm (Tr. 673) testified that second indemnity belts were laid down in Washington and Oregon for the 1870 grant
1658 by the Commissioner of the General Land Office and diagrams thereof filed with the local land offices on November 10, 1906. Said exhibit also shows that between Kalama and Tacoma, Washington, the interior lines of said second indemnity belt in Washington were 50 miles and the exterior lines 60 miles from the line of definite location of said railroad and coterminous with and parallel to the exterior lines of first indemnity limits. Said second limits were established on both sides of the entire line authorized by the Joint Resolution of 1870.

Plaintiff's Exhibit 207 Revised is a statement of the adjustment of the grant as to the State of Oregon, etc., and was identified and introduced by plaintiff's witness Barber (Tr. 302, 303). Said Exhibit 207 Revised shows that there had been charged to the grant and approved properly and patents issued in second indemnity limits of Oregon for 5,981.96 acres and that the Railway Company had selected 40 acres in said second indemnity limits.

Plaintiff's Exhibit 208 Revised, identified and introduced by witness Barber (Tr. 303), is a statement showing status of grant of 1870 in Oregon by years to December 31, 1935. Under the column, "Disposal to company—indemnity" said exhibits shows that in second indemnity limits 5,821.96 acres were selected during the year 1906, 40 acres were selected during the year 1909, 120 acres during the year 1911, and 40 acres were selected during the year 1922.

Government Exhibits 207 Rev., 208 Rev., 210, and 69 show that from the period 1907 to 1935, inclusive, said lands which were so selected in said second indemnity limits of Oregon

1659 have been carried on the records of the United States Land Office as having been properly selected and charged to the grant of 1870.

N. P. Exhibit 139, identified and introduced by defendants' witness Schwarm (Tr. 643), shows that there have been patented to the company and charged to the grant of 1870 as selected or vacant lands in second indemnity limits of Washington 1,394.02 acres. Plaintiff's Exhibit 206, identified and introduced by plaintiff's witness Barber (Tr. 302), showing status of grant under the Joint Resolution of 1870 in Washington by years, shows that of said 1,394.02 acres, 311.59 acres were selected by the company in 1907, 80 acres were selected in 1913, 760 acres were selected in 1916, 80 acres were selected in 1917, and 160 acres were selected in 1923. Government Exhibits 201 Rev., 206, 210 Rev., and 69 show that said lands so patented or selected in said second indemnity limits of Washington have been carried on the records of the United States Land Department as properly patented and selected down to December 31, 1935.

Plaintiff's witness, George E. Clayton, identified and introduced (Tr. 320) Plaintiff's Exhibits 220, 221, and 222: Exhibit 220 is a statement showing descriptions of lands withdrawn as of June 5, 1924, in second limits of Washington under the withdrawal of March 1, 1898. Exhibit 221 shows the same information under the withdrawal of December 18, 1902, and Exhibit 222 shows the same information as to withdrawal of August 27, 1906. The following is a statement of the substance of said three exhibits.

1660 Ptf. Ex.	Date of withdrawal order	Purpose	Acres
220	March 1, 1898	Forest	199,603.18
221	Dec. 18, 1902	"	11,160.00
222	Aug. 27, 1906	"	2,233.48
			213,001.66

Said Plaintiff's Exhibit 207, statement of adjustment of grant of 1870 in Oregon as of December 31, 1935, shows the area of said grant and the losses therein. It shows that all the lands in place limits in Oregon totalling 427,945.45 acres had been lost to the grant as of the date of final definite location. The deficiency in Oregon exceeded the surplus in Washington, excluding the Tacoma Overlap, by 289,238.76 acres.

Plaintiff's Exhibit 210 Revised, identified and introduced by witness Barber (Tr. 309), is statement of adjustment of the entire grant of 1870 as of December 31, 1935. It shows the total areas lost to grant to be 821,748.55 acres. Said Plaintiff's Exhibits

206, 208, and 210 show that on and immediately prior to March 1, 1898, December 18, 1902, and August 27, 1906, the dates of said withdrawals, the deficiency in the entire grant and its status was as follows:

Date for which deficiency shown	Area selected by company and vacant surveyed, first, second, and mineral indemnity limits	Deficiency if only surveyed lands counted	Area vacant unsurveyed first, second, and mineral indemnity limits	Deficiency counting both surveyed and unsurveyed lands
12-31-1897	263, 340. 05	1, 195, 989. 49	429, 934. 03	766, 055. 46
12-31-1898	261, 370. 80	1, 197, 958. 74	92, 175. 63	1, 105, 783. 11
12-31-1901	258, 517. 91	1, 200, 811. 63	88, 610. 16	1, 112, 201. 47
12-31-1902	235, 906. 93	1, 223, 422. 61	14, 041. 65	1, 209, 380. 96
12-31-1905	234, 705. 12	1, 224, 624. 42	6, 600. 61	1, 218, 023. 81
12-31-1906	230, 159. 37	1, 229, 170. 17	1, 125. 72	1, 228, 044. 45

1661 N. P. Exhibit 140, identified and introduced by defendants' witness Schwarm (Tr. 653), and said Plaintiff's Exhibits 206 and 208, show the area of vacant surveyed land available for selection in all indemnity limits of the entire grant of 1870 as of March 1, 1898, and immediately prior and subsequent to December 18, 1902, and August 27, 1906, as follows:

	First indemnity, entire grant	Second indemnity, Washington	Second indemnity, Oregon	Mineral indemnity, entire grant
	Acres	*Acres*	*Acres*	*Acres*
March 1, 1898	29, 184. 01	7, 448. 33	22, 040. 07	3, 233. 66
December 31, 1901	28, 437. 18	929. 94	9, 002. 55	3, 233. 66
December 31, 1902	23, 389. 41	433. 63	8, 605. 51	3, 233. 66
December 31, 1905	7, 587. 78	4, 069. 87	6, 610. 16	3, 233. 66
December 31, 1906	3, 340. 95	162. 34	5, 821. 97	3, 233. 66

Plaintiff's Exhibit 209, identified and introduced by plaintiff's witness Barber (Tr. 308), is a tabulation showing use of second indemnity base and available lands in second indemnity limits in Washington and Oregon. Said exhibit shows at the dates of said respectfve withdrawals the railroad company had subsequent losses in the state of Washington as follows:

	Acres
December 31, 1897	128, 302. 36
December 31, 1898	128, 178. 62
December 31, 1901	128, 076. 63
December 31, 1902	128, 076. 63
December 31, 1905	127, 558. 63
December 31, 1906	126, 749. 34

Said plaintiff's Exhibits 209,210 Revised, and 215 (Exhibit 215, identified and introduced by witness Barber (Tr. 317), show that the Railway Company had unused proper losses,

1662 exclusive of said Tacoma Overlap area, more than sufficient, and not less than the following amounts, to select all of the vacant available indemnity lands in all indemnity limits, amounting to 61,906.97 acres shown on N. P. Exhibit 140 Revised:

	Prior losses, entire grant, exclusive of Tacoma overlap	Subsequent losses, Washington	Subsequent losses, Oregon	Mineral losses, entire grant
December 31, 1897	157,029.42	128,362.36	278,188.81	3,233.66
December 31, 1898	157,029.42	128,178.62	278,188.81	3,233.66
December 31, 1901	157,029.42	128,076.63	278,188.81	3,233.66
December 31, 1902	157,029.42	128,076.63	278,188.81	3,233.66
December 31, 1905	157,029.42	127,558.63	278,188.81	3,233.66
December 31, 1906	157,029.42	126,749.34	278,188.81	3,233.66

Plaintiff's said Exhibit 215 shows that on December 31, 1935 the Railway Company had unused prior losses, exclusive of said Overlap area, to the amount of 157,029.42 acres, and plaintiff's said Exhibit 209 shows that on said date defendant Railway Company also had 278,068.80 acres of Oregon subsequent losses available for selection of first indemnity lands in Washington.

Of the 213,001.66 acres of withdrawn lands there were surveyed 6,660.40 acres at dates of withdrawal, as follows: Plaintiff's Exhibit 220 shows that of the 199,608.18 acres withdrawn March 1, 1898, there were surveyed at said date of withdrawal, 4,426.92 acres. Plaintiff's Exhibit 222 shows that all of the 2,233.48 acres withdrawn August 27, 1906 had been surveyed prior to said date of withdrawal. Plaintiff's Exhibit 221 shows that none of the 11,160 acres withdrawn December 18, 1902, were surveyed prior to withdrawal.

1663 Plaintiff's said Exhibits 206 Revised, 208, and 210 Revised show that the grant of 1870 continued deficient as shown in tabulation on p. 11, supra, at all times since said withdrawals of 213,001.66 acres up to and including June 5, 1924, and at all times since. Plaintiff's said Exhibit 210 Revised shows that the deficiency in the entire grant of 1870 as of December 31, 1935, excluding the Overlap area, was 581,292.47 acres.

Said N. P. Exhibit 139 shows status of the grant of 1870 on December 31, 1935. Said exhibit shows that the losses subsequent to July 2, 1864, were 224,386.10 acres in the State of Washington; that there have been charged to the grant in second limits as selected or vacant 1,394.02 acres.

N. P. Exhibit 141 Revised, identified and introduced by defendant's witness Schwarm (Tr. 657), is a statement of unindemnified losses in the grant of May 31, 1870, on December 31, 1935, usable as base for selection of indemnity lands withdrawn

on and after March 1, 1898, and within the exterior boundaries of national forests or other government reservations on June 5, 1924. Said exhibit shows that on December 31, 1935, defendant had 122,791.21 acres of unused subsequent losses in Washington. It also had unused nonmineral prior losses in Washington (exclusive of Tacoma Overlap), amounting to 61,686.83 acres,
1664 as shown by Plaintiff's said Exhibit 215. Said N. P. Exhibit 141 Revised shows that defendant also had 14,462.11 acres of prior and 13,974.03 acres of subsequent losses to the grant of 1870 which were erroneously used as base for selection of lands under the grant of 1864 and credited back to the grant of 1870.

Plaintiff's Exhibit 205, identified and introduced by plaintiff's witness Barber (Tr. 291), is a photostatic copy of an adjustment, commonly known as the Jones Adjustment, which was submitted to the Secretary of the Interior on March 26, 1906. Jones was a clerk in the General Land Office. This was the adjustment that was before the Supreme Court in 256 U. S. 51. No action with respect to said adjustment was taken by the Secretary of the Interior. At page 432 of said exhibit the adjustment of the 1870 grant for Washington and Oregon appears. Witness Barber testified (Tr. 291) from said exhibit that the grant in the State of Washington is shown thereby to be 1,765,582.60 acres. There is a difference between that amount and the acreage shown on Plaintiff's Exhibit 201 of approximately 637,000 acres. It would not appear that the Tacoma Overlap area has been included. Including the Tacoma Overlap area the acreage of the 1870 grant in primary limits of Washington was 2,399,493.25 acres. The witness thought it could be properly inferred that the overlap area was not included in the area of the grant by the Jones Adjustment (Tr. 293).

At page 420 of said Jones Adjustment is a statement of adjustment of the grant for the State of Wisconsin. No deduction is made for the area of the conflict of the Northern Pacific grant of 1864 with the prior grant to the Portage,
1665 Winnebago R. Co. At said page 420 the apparent loss to the grant in Wisconsin is given as 719,824.34 acres, and the total area of the grant in place limits is given as 722,019.64 acres.

Plaintiff's witness, Charles L. Van Doren (Tr. 12), is a law examiner in the General Land Office. After the decision of the Supreme Court in the Forest Reserve Case, April 1921, he received instructions early in December 1921 to proceed with the adjustment of the grant. The adjustment began about the first of January 1922. The representatives of the railroad were in Washington and helped us with their records, of which they had

about a carload. I think there were three of them with Mr. Schwarm. I was in charge of the Government men, having at one time a maximum of thirteen. The work continued practically two years. Mr. Work was Secretary and the First Assistant was Mr. Finney. William Spry was Commissioner of the General Land Office. The work was directly under my charge.

Plaintiff offered the so-called tentative adjustment, Plaintiff's Exhibit 66, which consists of a letter from William Spry, Commissioner of the General Land Office, dated December 19, 1923, to Messrs. Britton & Gray, counsel for the Northern Pacific Railway Company, and attached is a copy of the tentative report. The letter invites the railroad to file with the Commissioner any brief or objections. At the same time a similar letter went to the Forest Service, inviting comments, if desired, and also one went to the Attorney General. (Tr. 15). The letter was prepared by Van Doren and signed by the Commissioner of the General Land Office. The adjustment is what we call the tentative adjustment. The letter is printed in the Joint Com-
1666 mittee Record at p. 249. That portion of the letter material here is as follows:

"This memorandum represents tentative conclusions reached in the pending adjustment of the grants to this company made necessary by the decision of the United States Supreme Court, April 11, 1921 (256 U. S. 51), and is now given to the parties interested, with the advice that if they desire to file briefs, statements, or arguments relative thereto, 60 days from the date hereof will be accorded for such purpose."

Said tentative adjustment contains a tabulation entitled, "Statement of adjustment of grant to the Northern Pacific Railway Company as to the State of Washington, under the Resolution of May 31, 1870, and acts supplemental thereto." Said tabulation states that the total area of the grant in Washington is 2,402,483.72 acres. It lists the Tacoma Overlap as a loss to the grant as follows:

"Lost to grant: Tacoma overlap, 637,500.46."

There is no deduction in said tentative adjustment for the area of the Tacoma Overlap.

1667 Defendants' witness Schwarm testified (Tr. 566) that from time to time in the progress of the work on the tentative adjustment under Mr. Van Doren their sheets were turned over to him, and he examined them and if any differences or discrepancies were found, Mr. Van Doren was informed and checked them with his records, and where he found the railroad records were correct proper changes were made, and where the General Land Office records were correct the

1668 Railway Company made corrections in its records. Said Schwarm further testified (Tr. 670) that all the lands within the Tacoma Overlap in the tentative adjustment of 1921 for the grant of 1870 were written in red ink and carried in a separate column for the Tacoma Overlap lands, all the descriptions in the areas and remarks being written in red. Mr. Lyons stated that this point was mentioned so he might argue that the Tacoma Overlap was not overlooked and not deducted through inadvertence (Tr. 670).

Plaintiff's Exhibit 67 (Tr. 16, 17) is a certified copy of letter from the Acting Forester to the Commissioner of the General Land Office in response to the invitation to file briefs or objections to the tentative adjustment. The letter is dated January 12, 1924. It appears at page 9 of the Joint Committee Record. The material part of said Exhibit 67 is as follows:

"Suggestion 4. Your tentative adjustment shows the acreage of the grant from Portland, Oreg., to Tacoma, Wash., under the joint resolution of May 31, 1870, as 2,838,958.02 acres and that this grant was deficient 1,230,442.89 acres on December 31, 1921. It is difficult for me to understand the large acreage of this grant in view of the figures set out in the Jones unapproved adjustment of 1906, which gave the acreage of this grant as 2,200,508.03 acres or 638,450.99 acres less than the present tentative adjustment. It must be that the present adjustment figures include the Tacoma Overlap, i. e., the area of supposed conflict between the line from Wallula to Tacoma and the main line from Portland to Tacoma. To now include the acreage of the Tacoma overlap in the grant under resolution of 1870 is to increase the acreage of his grant by approximately 638,450.99 acres over and above what your office has heretofore considered the acreage of this grant to be. If I am correct in my understanding of what the previous position of the Interior Department has been with reference to the Tacoma Overlap, it is that these lands were not included in any way in the grant made by the resolution of May 31, 1870; and further, as it was not the intention of Congress to make a double grant of the lands in the Tacoma Overlap, these lands were excluded in toto

1669 from the grant under the resolution of 1870, and that this being true, no indemnity selection rights accrued to the Northern Pacific under the resolution of 1870 for any of the lands in the Tacoma Overlap. (U. S. v. Ore. Calif. R. Co., 164 U. S. 526.) The 638,450.99 acres in the supposed Tacoma Overlap should be deducted from the measure of the grant extending

from Portland to Tacoma under the joint resolution of May 31, 1870.

* * * * * *

"Recapitulating the suggestions contained in this letter, I suggest that the tentative adjustment be modified—

* * * * * *

"10. To deduct for the Tacoma Overlap, 638,450.99."

Plaintiff's Exhibit 68 (Tr. 17, 18), is certified copy of letter of March 18, 1924, from Britton & Gray, attorneys for the Northern Pacific Railway Company to the Commissioner of the General Land Office. It is printed in the Joint Committee Record at p. 404. Plaintiff's witness Van Doren (Tr. 18) testified that the letters from the Forester and the Railway Company came to his attention and were given consideration by the Land Department, and thereafter the Commissioner of the General Land Office made a report and submitted it to the Secretary of the Interior on March 5, 1925. Said letter was written by the witness and certified copy thereof was received in evidence as Plaintiff's Exhibit 69 (Tr. 22). Copy of the material portions of said Exhibit 69 is as follows:

Plaintiff's Exhibit 69

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, March 5, 1925.

THE SECRETARY OF THE INTERIOR.

SIR: Subject to the provisions of the joint resolution of June 5, 1924, referred to hereinafter, I have the honor to submit herewith an adjustment of the grants of public land made by the act of July 2, 1864 (13 Stat. 365), and the joint resolution of May 31, 1870 (16 Stat. 378), to the Northern Pacific Railroad Co. (now Railway Co.), as disclosed by the records of this office.

1670 In view of the decision of the Supreme Court of the United States, April 11, 1921, United States v. Northern Pacific Railway Co. (256 U. S. 51), relative to the adjustment of said grants, and any deficiency that might be found therein, special care has been taken in ascertaining the status of said grants; to determine whether in fact any deficiency exists therein; and if so, the date when such deficiency first became apparent. The adjustments have been made on the basis of the records of this office as of December 31, 1921. Transmitted herewith are tabulated statements, showing in detail and in condensed form the basis for the conclusions herein.

* * * * * *

The area within the primary limits of the grant under the joint resolution of May 31, 1870, is 2,827,319.47 acres, from which has been deducted 637,500.46 acres, being the area within what is commonly known as the "Tacoma Overlap". This area has been shown in the adjustment of the grant under the act of July 2, 1864, and as Congress in passing the joint resolution of May 31, 1870, did not grant to the northern Pacific Railroad (now Railway) Co. any land already granted to said company under the earlier act, the area of said "overlap" is deducted from the area of the grant by the joint resolution to 2,189,819.01 acres.

The tabulation submitted, showing the condition of the grant under the joint resolution of May 31, 1870, as of the dates of definite location, shows a deficiency at that time of 75,948.58 acres. From that date the deficiency has continued to increase, due to entries (usually preceded by settlement prior to survey) of lands within the indemnity limits and withdrawals (largely for national forests) of lands within the indemnity limits, until on December 31, 1921, the area then remaining subject to selection by the company was so reduced as to increase the deficiency to 573,074.42 acres. The mineral losses in the primary limits of this grant are only 1,205.81 acres, while the mineral depletions in the indemnity limits are only 900 acres and therefore have no bearing whatever on the date when said grant became deficient.

The records of the Northern Pacific Railway Co. were placed at the service of this office, points of difference were immediately investigated, and corrections were made where necessary on the records of this office or on the company's records. A considerable area, however, shown on the records of this office as lost to the grant or otherwise disposed of is still carried by the company on their records as selected or as subject to the grant.

* * * * *

By letters dated December 19, 1923, this office submitted to the forester, Forest Service, Department of Agriculture, and to Messrs. Britton & Gray, resident attorneys for the Northern Pacific Railway Co., and through the department, to the 1671 Attorney General, Department of Justice, a memorandum of a tentative adjustment of the grants to the Northern Pacific Railway Co., together with certain tabulations in connection therewith * * *. In submitting the memorandum of the tentative adjustment to the parties interested they were advised that, if they so desired, they might file briefs, statements, or arguments relative thereto.

Under date of January 12, 1924, the acting forester, Forest Service, Department of Agriculture, filed an exhaustive state-

ment relative to the grants to the Northern Pacific Railway Co. and to the memorandum covering the tentative adjustment of said grants. The acting forester concludes his statement with a recapitulation and with the suggestion that the tentative adjustment of the grants be modified to show some 21 points, which he then proceeds to enumerate.

While some of these points raise questions entirely beyond the jurisdiction of this office, it nevertheless seems fitting that each point enumerated by the acting forester should be given consideration herein.

* * * * * *

"10. To deduct for the Tacoma Overlap."

In fact thus far in the adjustment of these grants, the selections made and approved in this area have been on the basis that Congress did not, as hereinbefore stated by the joint resolution of May 31, 1870, make a grant of land already included in the act of July 2, 1864. The losses in the primary limits of the grant by the joint resolution of May 31, 1870, in the State of Washington (excluding the "overlap") total 391,642.56 acres; the area available in the first indemnity limits at the dates of definite location of the road was 432,043.08 acres. As there was therefore in the State of Washington "at the time of the final location thereof, the amount of lands per mile granted by Congress to said company within the limits prescribed by its charter," it is evident that in excluding the "overlap" no second indemnity limits would be required in the State. In the adjustment submitted herewith the lands within the second indemnity limits, as shown on the diagrams in use in this office, have been compiled, the area patented to the company (1,231.59 acres) and the vacant lands in said limits (162.43 acres), are charged to the company under the grant. The withdrawn lands in said limits aggregate 231,379.78 acres, 204,389.91 acres being withdrawn in the year 1898.

* * * * * *

Under date of March 18, 1924, Messrs. Britton & Gray, Washington counsel for the Northern Pacific Railway Co., submitted a statement wherein were given the company's objections
1672 to the tentative adjustment of the grants as outlined in the memoranda thereof.

* * * * * *

As a matter of fact, the second indemnity limits were established on the request of the company upon their statement that such limits were necessary in order that the grant might be satisfied.

* * * * * *

The following tabulations are transmitted herewith:

* * * * * *

Exhibit N. Statement of the grant, State of Washington.

* * * * * *

I am transmitting herewith the letter of the acting forester dated January 12, 1924, replying to office letter of December 19, 1923, together with certain memoranda submitted to this office by the acting forester, under date of July 12, 1923; also the brief filed by Messrs. Britton and Gray, as attorneys for the Northern Pacific Railway Co., under their letter dated March 18, 1924.

Public Resolution No. 24, Sixty-eighth Congress, approved June 5, 1924, provides, among other things, for a full and complete congressional inquiry into the Northern Pacific land grants, and that the Secretary of the Interior shall advise Congress of the status of said grants with recommendation for such action as he believes right and proper for the further adjustment thereof, and in the meantime the Secretary of the Interior is directed to withhold until March 4, 1926, his approval of the adjustment of the grants to the Northern Pacific Railway Co.

This report and the tabular statements accompanying same are respectfully submitted for such action as may be deemed appropriate. Notice of this action has not been given to any of the parties interested herein.

Very respectfully,

WILLIAM SPRY,
Commissioner.

EXHIBIT N

Statement of adjustment of grant to the Northern Pacific Railway Co. as to the State of Washington under the resolution of May 31, 1870, and acts supplemental thereto.

1873 PRIMARY LIMIT

		Acres
Area		2,399,398.45
Chargeable to grant	1,370,255.43	
Lost to grant:		
Prior to act of July 2, 1864	165,975.65	
Tacoma Overlap	637,500.46	
Mineral surveyed and unsurveyed	1,205.81	
Between act July 2, 1864, and definite location	224,461.10	
	1,029,143.02	2,399,398.45

RECAPITULATION

		Acres
Area of granted limits		2,399,398.45
Chargeable to grant in primary limits		1,370,255.43
Apparent loss in place		1,029,143.02
Chargeable to grant:		
First indemnity limits	219,902.93	
Second indemnity limits	1,394.02	
Mineral indemnity limits	00.00	
Mineral in primary limits	605.52	
Mineral in first indemnity limits	80.34	
Outside limits	4,311.47	226,294.28
Amount due under grant in Washington		802,848.74
Less area within the "Tacoma Overlap" being granted to the company, under the act of July 2, 1864, and not under the joint resolution of May 31, 1870		637,500.46
		165,348.28
Less area within the odd section of the first and second indemnity limits, selected by the company under lieu acts		4,941.18
Net amount due under grant in Washington		160,407.10

Plaintiff's Exhibit 70 (Tr. 22) is certified copy of letter dated March 6, 1925, from Hubert Work, Secretary of the
1674 Interior, to Hon. N. J. Sinnott, Chairman of the Joint Committee of Congress. It is printed at p. 370 of the Joint Committee Record. Said Exhibit 70 is as follows:

Plaintiff's exhibit 70

DEPARTMENT OF THE INTERIOR,
Washington, March 6, 1925.

Hon. N. J. SINNOTT,
Chairman, Joint Committee,
Northern Pacific Land Grant;
House of Representatives.

MY DEAR MR. SINNOTT: I have your request for early report under Public Resolution No. 24, Sixty-eighth Congress, entitled "Joint resolution directing the Secretary of the Interior to withhold his approval of the adjustment of the Northern Pacific land grants, and for other purposes," section 2 of which directs the Secretary of the Interior to advise Congress of the status of said lands, "recommending such action as he believes right and proper for the further adjustment thereof."

This matter has been the subject of extended investigation and consideration by the General Land Office of this department, and as a preliminary report to your committee, I am transmitting the report of the Commissioner of the General Land Office, dated March 5, 1925, together with Exhibits A to R, being statements

of the grant, and Exhibits 1 to 5, being maps showing limits and terminals.

Further recommendation and report will be submitted by me under the resolution as soon as the situation will permit.

Sincerely yours,

HUBERT WORK,
Secretary.

Plaintiff's Exhibit 71 (Tr. 30) (JCR 683) is a certified copy of letter of March 25, 1925, from Acting Secretary E. C. Finney to Hon. N. J. Sinnott. Said Exhibit 71, so far as material, is as follows:

Plaintiff's exhibit 71

DEPARTMENT OF THE INTERIOR,
Washington, March 25, 1925.

Hon. N. J. SINNOTT,
Chairman, Joint Committee,
Northern Pacific Land Grants,
House of Representatives.

1675 MY DEAR MR. SINNOTT: Public Resolution No. 24, approved June 5, 1924, dealing with the adjustment of the Northern Pacific land grants, created a joint committee of Congress to make an investigation of said land grants and report to Congress its conclusions and recommendations. Section 2 of the resolution directed the Secretary of the Interior to advise Congress of the status of the grants, recommending such action as he believes right and proper for the further adjustment thereof.

The Commissioner of the General Land Office was directed by me to make a thorough and careful examination of the records of his office and to submit report as to the status of said grant and any matters and questions bearing thereon. Such report, with accompanying exhibits, including tabulations and maps, was submitted to me March 5, 1925, and in view of the urgency of your committee to be supplied with data so that it might begin work immediately, I transmitted the report of the commissioner, with accompanying exhibits, to you on March 6, 1925, stating that further recommendations and report would be submitted by me as soon as practicable. In so transmitting the commissioner's report and accompanying data, I did not approve or disapprove the same, but, as indicated in my letter of March 6, transmitted it for the information and use of the committee.

The statement of the grant, as embodied in Exhibits A to R, inclusive, and the diagrams and maps, Exhibits 1 to 5, inclusive, as well as the statements of fact contained in the commissioner's report of March 5, are the result of long and exhaustive examina-

tion of the records of the General Land Office by officers and employes of that office. I could not, of course, personally verify the same, but adopt his findings in that respect as exhibiting the status of the grants as shown by the records of the General Land Office.

The Commissioner submitted to the Department of Agriculture and to the resident attorneys for the Northern Pacific Railway Company a memorandum of tentative adjustment of the grants, and in response thereto statements or replies were filed by the Department of Agriculture and by the railway company. The points raised in these statements or replies have been taken up in order and discussed by the commissioner in his report and will be reviewed briefly herein. The points raised by the Department of Agriculture were as follows:

* * * * *

(10) To deduct for the Tacoma overlap.

It appears that the commissioner made a deduction on this point. See paragraph 3 of his letter of March 5, 1935, page 3, printed report. This deduction is approved.

* * * * *

1676 While Public Resolution No. 24, as stated at the beginning, directed the Secretary of the Interior to advise Congress of the status of the Northern Pacific land grants, recommending such action as he believes right and proper for further adjustment thereof, section 3 of the resolution created a joint committee of Congress to make a thorough and complete investigation of the grants, of the facts, and the law pertaining thereto, the committee to report to Congress "its conclusions and recommendations." The committee or a subcommittee thereof was authorized to sit during session or recess of Congress; to require by subpoena or otherwise the attendance of witnesses, and the production of books, documents, and papers, and to take testimony of witnesses under oath, etc.

Therefore, while the department has presented by way of exhibits and maps a large array of facts appertaining to the grants, has submitted the findings and conclusions of the Commissioner of the General Land Office, so that Congress may be advised of his findings, and has in this report endeavored, where possible, to express a definite opinion upon questions in issue, it is manifestly impossible for the Secretary of the Interior to reach definite conclusions or make definite recommendations on many of the most important questions involved. In a number of instances the necessary information is not available to the department. Also, decision of important and doubtful questions should be had only after hearings, and in some cases after examination

of books and records not available to this department. However, the committee under the broad powers vested in it by the resolution will be enabled to look into these matters thoroughly and to hear all parties in interest upon the issues which may be raised. If additional information which can be compiled from or is available in the records of this department or in any of its bureaus is desired by the committee, same will be furnished.

Very truly yours,

E. C. FINNEY,
Acting Secretary.

1677 Plaintiff's Exhibit 74 (Tr. 31), is a letter from E. C. Finney, First Assistant Secretary of the Interior, to the Commissioner of the General Land Office, dated December 10, 1925, directing him to compile a statement showing the dates of the various withdrawals within the second indemnity limits, and a statement of the status of the land at dates of such withdrawal, that is, whether there was at that particular date a deficiency existing, or whether there remained within the limits a sufficient area to satisfy applicable losses, in addition to the areas withdrawn.

Plaintiff's Exhibit 75 (Tr. 32), is a certified copy of a letter from E. C. Finney, Acting Secretary of the Interior to the Chairman of the Joint Committee, dated April 30, 1926, transmitting with approval letter from the Commissioner of the General Land Office, dated April 30, 1925, addressed to the Secretary of the Interior. The Commissioner's letter was prepared pursuant to request of the Secretary of December 10, 1925, and transmitted statements "showing those withdrawals affecting the second indemnity limits of each grant, which, when made, were valid under the decision of the Supreme Court as given April 11, 1921 (256 U. S. 51), there being at the date when such withdrawal was made sufficient vacant, unappropriated, public land in the second indemnity limits of such State to satisfy the remaining unused second indemnity losses in said State." Part of the withdrawal of May 12, 1904, and all earlier withdrawals in the second indemnity limits in Montana and all of the with-

1678 drawals in the second indemnity limits in Idaho prior to December 11, 1906, were found to be valid. With respect to the second indemnity limits in the State of Washington, under the grant of 1870, the letter states:

"As it is found that the vacant land in the second indemnity limits is insufficient to satisfy the unused second indemnity losses, thus showing the existence of an apparent deficiency, attention is directed to the statement transmitted to the Secretary of the Interior, by this office, under date of March 5, 1925; said state-

ment appears on page 376, part 1 of the hearings before the joint congressional committee, under the caption 'To deduct for the Tacoma overlap,' it is stated therein, in part, as follows: 'It is evident that in excluding the overlap no second indemnity limits would be required in the State.' There being no need of a second indemnity limit, it is evident that although such a limit was erroneously established and that there is not sufficient vacant land to satisfy the unused second indemnity losses, there can be no deficiency in said limit at any time."

1681 F. C. Sharood, a witness for defendants, testified that Northern Pacific Railway Exhibit No. 68 is a statement showing deductions made by the United States in connection with freight, passenger, and mail transportation under the Act of July 2, 1864, beginning with the year ending June 30, 1877, and down to December 31, 1931 (Tr. 86). The exhibit does not include or show any freight and passenger deductions for the years 1877 to and including 1882 for the reason that the records covering those years were destroyed in the record room in St. Paul some years ago. Said Exhibit 68 shows that the deductions made on transportation performed by Northern Pacific Railroad Company and by the Railway Company to December 31, 1929, and for the years of 1930 and 1931 were as follows:

	Freight and Passenger	Mail	Total
Northern Pacific Railroad Company	$1,238,215.81	$1,143,481.46	$2,381,697.27
Northern Pacific Railway Company to December 31, 1929	9,238,937.25	5,759,556.84	14,998,494.09
	$10,477,153.06	$6,903,038.30	$17,380,191.36
Year ended December 31, 1930	213,012.35	262,964.83	475,977.18
Year ended December 31, 1931	229,536.38	234,743.23	464,279.61
	$10,919,701.79	$7,400,746.36	$18,320,448.15

Said Exhibit 68 shows that the average deductions made by the United States on transportation for the five years, 1925–1929, inclusive, were $502,261.96.

1682 L. B. DAPONTE,
F. J. MCKEVITT,
P. R. FROST,
Attorneys for appellants, Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company.
WHITE & CASE,
Attorneys for appellant, Bankers Trust Company.
TAYLOR, BLANC, CAPRON & MARSH,
Attorneys for appellant, City Bank Farmers Trust Company.

1683 *Amendments to defendants' statement of evidence on Tacoma Overlap*

Page 4. Insert before last paragraph:

Plaintiff's witness Barber (Tr. 289) testified that the area of the odd-numbered sections within the overlap is 637,580.99 acres. The figure shown at the top of Government Exhibit 201 as being "Gross Area within Limits" includes the whole area of the odd-numbered sections within the conflict. Excluding the conflict, the area of the grant is shown to be 1,761,912.26 acres. So far as can be determined from the records of the General Land Office, the conflicting area of the Tacoma Overlap was not considered or treated as a part of the grant of 1870 and it was not included as a part of the area earned under the grant of 1870. It was treated as earned under the grant of 1864.

Page 4. Line 8—32,35[illegible].86, not .46. Instead of "the remaining 32,354.46 acres were lost to the grant of 1864 for one or another of the reasons specified in Section 3 of said act," put "and the remaining 32,354.86 acres were lost to the company as place lands because they were disposed of under filings and entries."

Page 5. Add:

(Mr. SCHWARM—cross-examination.)

Q. (Referring to land within Tacoma Overlap). It is a fact in your estimate of base in these hearings you haven't used any of that land as base?

A. We have not; no (1476).

Page 6. End of page, add:

"On cross-examination Mr. Schwarm testified that all of the above lists except Chehalis 61 for 40 acres were filed before the decision of the Secretary of the Interior in 25 L. D. 511, dated December 20, 1897, holding that the two grants had to be administered separately; that prior to the time of that decision the company assigned losses under the 1864 grant to take land
1684 within the limits of the 1870 grant and vice versa; and that all of these lands for which indemnity lands were selected were lost to settlers."

Page 7. Insert in line 12, following "Tr. 778":

There are only two lists describing the lands within the first indemnity limits of both grants selected in lieu of losses occurring within the Tacoma Overlap, colored in green. These lists are Olympia List 28 and Vancouver List 41 (Tr. 780).

~~Insert in line 13~~ following "Tr. 782":

"It was for 1,504 acres. It was ten years between the time of filing of the selection list and the decision in 25 L. D."

Page 7. Insert in line 22, following "July 1, 1898":

"Olympia List 28 was approved by the local land office on October 25, 1887.

By Mr. BIGGS. Our records show it was April 3, 1895—1,504.14 (date of patent, Olympia List 28).

By the WITNESS. I couldn't dispute that. From what I can tell it would be approximately correct. All I have is the number of the patent here.

By Mr. FROST. Then may it be understood we can verify the time that patent was issued for our Olympia List 28?

By the MASTER. Yes (783–784).

Page 8. Insert in line 2, following "Company":

"That is the full list".

Add before the word "All" in the same line:

"The lists for".

Page 8. Insert following line 4:

Plaintiff's witness Barber testified that Government Exhibit 205 is a certified copy of the Jones Adjustment submitted to the Department of the Interior on March 26, 1906. It contains a statement of the adjustment of the grant under the Resolution of 1870 as to the States of Washington and Oregon. The area of the grant in the State of Washington under the Resolution of 1870 is shown by this statement to be 1,765,582.60 acres. The gross area of the primary limits under the grant of 1870 in the State of Washington (Government Exhibit 201) is 2,399,-1685 493.25 acres. The area omitting the Tacoma Overlap, shown by Exhibit 201, is 1,761,912.26 acres. The figures are approximately the same, there being a slight difference between that figure and the figure of the Jones Adjustment of about 4,000 acres. It is apparent from this that the area of the Tacoma Overlap was not included in the Jones Adjustment as a part of the area under the grant of 1870.

Government Exhibit 205 is a certified copy of a letter from the Commissioner of the General Land Office to the Secretary of the Interior, dated March 26, 1906, stating that he is submitting tabulated statements showing the results of the readjustment of the grants of 1864 and 1870 directed by the Secretary's letter of February 29, 1904. It states that the grant of 1870 is shown to be deficient by 532,029.73 acres. Attached to this letter are tabulations containing the following figures relating to the grant of 1870 in the States of Washington and Oregon:

Total area of the grant in the primary limits in Washington	1,765,582.60
Total losses to the grant in Washington	412,579.35
Chargeable as indemnity	310,667.99
Deficiency in Washington	101,911.36
Deficiency in Oregon	430,118.37

Plaintiff's witness Barber further testified (309) that the second indemnity belt in Washington was laid down the latter part

of 1906, that it is just merely a guess, that the laying down of these limits was probably due to the fact that the Jones Adjustment disclosed a deficiency, and without regard to whether there was a deficiency in the grant on the date of final location, the limits were laid down. That was only witness' guess as to the reason.

Page 8. Omit the identification of Government Exhibit 206 (11-5-10), and insert the following:

Plaintiff's witness Barber further testified that he prepared a year-by-year sheet for the State of Washington under the 1870 grant, Government Exhibit 206. The facts reflected by this exhibit are shown by the records of the General Land Office.

1686 This exhibit shows the area of the losses occurring prior to July 2, 1864, to be 169,174.22 acres, and the area of the losses occurring between the date of the Act of July 2, 1864, and the date of definite location to be 224,386.10 acres, a total of 393,560.32 acres. This represents the total loss to the company in the State of Washington under the grant of 1870 as of the date of final location, September 22, 1882. The total of the vacant lands, both surveyed and unsurveyed in the first indemnity limits in Washington on the date of the final location of the road, September 22, 1882, is 432,509.79 acres. On the date of final location the area of vacant lands exceeded the total losses within the State by 38,949.47 acres. In his opinion there was no authority for laying down a second indemnity belt in the State of Washington because at the time of the final location there was land available in the first indemnity limits over and above the amount necessary to satisfy all losses in the State of Washington (294–297).

By Mr. DANLY. Plaintiff's exhibits with reference to the grant of 1870 are all offered showing the status of the grant assuming that authority existed for laying down the second indemnity belt. The reason for doing that was because to change the tabulations and leave out of them entirely any reference to the second indemnity belt, would add confusion to the Government's position; the Government's position being at all times that there was no justification for laying down the second indemnity belt; that it was wholly unauthorized, and that the comparatively small area of lands which have been patented under the grant in the second indemnity belt was erroneously patented and should be compensated for.

Mr. FROST. I did not hear that last statement.

The SPECIAL MASTER. That the small area of lands patented in the second indemnity belt were erroneously patented and should be compensated for.

Mr. DANLY. The acreage is 1,191.59 acres patented and 200 acres selected, making a total of 1,391.59 acres.

Mr. FROST. Was that relief asked for in the amended complaint?

Mr. DANLY. No; it was not.

Mr. FROST. So that it is not until this time that it has been the position of the plaintiff that the railway company had no right to these 1,300 or 1,200 or 1,100 acres in the second limits?

Mr. DANLY. That is not true, Mr. Frost. We have taken the position all the time, as the records will show, that the second indemnity belt in the State of Washington was unauthorized.

1687 However, in the drafting of the bill of complaint, which, of course, was a tremendous job, we did not include as an item among the losses that we were asking compensation for, lands which we claim were erroneously patented in the grant of 1870 in the second indemnity belt in the State of Washington.

I am not just sure that I have made myself clear about the reason for offering these exhibits containing the second indemnity belt.

The SPECIAL MASTER. I understand it perfectly.

Mr. DANLY. Of course we hope that the fact that they are offered in that way shall not be taken in any wise as an indication of weakness on our part in our position.

The SPECIAL MASTER. Indications of weakness do not make any difference. It is going to come out in the wash somehow, without reference to indications. The only indications of weakness that I shall pay any attention to are in argument. I frequently detect counsel referring to something sometimes that they do not believe themselves.

Mr. DANLY. We realize that we take some risk of being misunderstood when we do submit tabulations containing a second indemnity belt and the status of it when we contend that it was wholly unauthorized. But I think I have made it clear.

The SPECIAL MASTER. Yes.

Mr. DANLY. The explanation of it is that to change the set-up would be a tremendous job and would perhaps increase confusion.

Page 9. Line 18. Add:

"It shows the total prior losses to be 106,735.24 acres."

Page 11. Line 15. Omit: "Said plaintiff's exhibits 206, 208, and 210 show that on and immediately prior to March 1,

1688 1898, December 18, 1902, and August 27, 1906, the dates of said withdrawals, the deficiency in the entire grant and its status are as follows:" and insert:

It shows the total area lost to the grant to be 821,748.55 acres.

Page 11. Column one entitled "total area lost to grant including Tacoma Overlap 1,459,329.54" should be omitted.

Add to this page:

Government Exhibit 206 shows the vacant surveyed and unsurveyed land and the area disposed of to the company in the second indemnity limits in Washington as follows:

Date	Disposal to company		Vacant	
	Indemnity	Other acts	Surveyed	Unsurveyed
Sept. 22, 1882			39,045.72	268,692.07
Dec. 31, 1884			21,683.94	249,050.66
Dec. 31, 1885			22,953.23	247,930.66
Dec. 31, 1886			22,523.94	247,650.66
Dec. 31, 1887			18,045.58	247,650.66
Dec. 31, 1888			12,473.98	247,269.23
Dec. 31, 1889			6,861.90	244,167.87
Dec. 31, 1890			3,248.23	237,566.65
Dec. 31, 1891			2,471.68	233,334.14
Dec. 31, 1892			940.55	232,772.14
Dec. 31, 1893			980.55	231,938.72
Dec. 31, 1894			1,020.55	230,572.43
Dec. 31, 1895			1,940.55	224,485.96
Dec. 31, 1896			1,940.55	223,364.94
Dec. 31, 1897			7,528.33	217,159.51
Dec. 31, 1898			884.30	19,883.08
Dec. 31, 1901			929.94	18,896.92
Dec. 31, 1902			433.63	7,243.08
Dec. 31, 1905		31.20	4,069.87	
Dec. 31, 1906	311.59	31.20	162.43	
Dec. 31, 1913	391.59	170.12	82.43	
Dec. 31, 1916	1,151.59	170.12	82.43	
Dec. 31, 1917	1,231.59	170.12	2.43	
Dec. 31, 1923	1,391.59	170.12	2.43	
Dec. 31, 1935	1,391.59	170.12	2.43	

1689 Government Exhibit 206 shows that a total of 220,102.78 acres was selected by the company in the first indemnity limits in Washington and 4,771.06 acres received under lieu Acts in the same limits. Government Exhibit 208 shows a total of 5,002.39 acres was received in the first indemnity limits in Oregon.

Page 12. Lines 17–22, omit:

"Said exhibit shows at the dates of said respective withdrawals the railroad company had subsequent losses in the State of Washington in an amount more than sufficient to select all then available vacant surveyed lands in second indemnity limits in Washington on and before each respective date of withdrawal as follows:"

Insert in lieu of the sentence to be stricken the following:

"Said exhibit shows the unused subsequent losses in Washington as of particular dates to be as follows:"

Page 13. Following the tabulation in line 12, insert:

Northern Pacific Exhibit 140 shows the total lands vacant, surveyed, and available as indemnity on March 1, 1898, to be 61,906.87 acres.

Then insert the following paragraph:

Government Exhibit 209 shows the subsequent losses at the date of final location of the road for Washington to be 224,386.10 acres and for Oregon, 321,210.21 acres. It shows the

amount of losses used to secure indemnity lands as of particular years as follows:

	Base used, Washington
December 31, 1884	13,228.05
December 31, 1885	68,633.27
December 31, 1887	6,812.69
December 31, 1888	3,583.09
December 31, 1891	4,818.02
December 31, 1892	2,016.11
December 31, 1893	200.00
December 31, 1895	6,633.54
December 31, 1896	1,875.87
	Base used, Oregon
December 31, 1921	43,061.40
December 31, 1922	40.00
December 31, 1923	40.00

Government Exhibit 209 shows that the vacant land in Washington on December 31, 1897, in the second indemnity limits amounted to 224,687.84 acres.

1690 Page 13. Add at end of line 19:

It shows the unused prior losses for Oregon to be 94,189.17 acres and for Washington, 61,686.83, a total of 155,876 acres. It also contains an item entitled "Improperly used outside of limits," composed of "selection approved 721.16" and "Relinquished, Act 1898, 432.26," for which Washington prior losses were designated.

Plaintiff's Exhibit 216, identified by plaintiff's witness Barber (818), is a tabulation showing the use of subsequent losses. It contains an item designated "Improperly used outside of limits," composed of 630.44 acres of selections approved and 1,126.46 acres of land relinquished under the Act of 1898 for which Washington subsequent losses were designated, and 40 acres relinquished under the Act of 1898 for which Oregon subsequent losses were designated.

Page 16. Following line 3 the following insert should be made:

Plaintiff's witness Barber testified that:

He had a diagram prepared by the Survey and Map Division of the General Land Office (Government Exhibit 291) showing the lands involved in the Winona Case, 113 U. S. 618 (1416). It is prepared from the official railroad diagram showing the lands involved in that case (1418).

By the MASTER. It will be admitted to be used as illustrating the case to which it refers (1419).

Government Exhibit 21 shows the lines of the Winona and St. Peter and Minnesota Central Railroads as they intersect each other, with six and ten-mile limits laid down for each grant. Certain of the sections are cross-hatched in red and designated

on the diagram "Odd sections within overlap of 6 miles and 10 miles granted limits of Winona and Saint Peter and Minnesota Central (formerly Minnesota and Cedar Valley) Railroads." This exhibit is impractical of inclusion in a narrative statement or printed record and will be certified in its original form pursuant to Supreme Court Rule 10 (4)..

Page 16. Line 19, "Offers" should be "offered."

Page 16. Insert in line 27 after "(Tr. 15)":

It states that after due consideration of the entire matter in the light of the briefs and arguments filed, a report will be submitted to the Secretary of the Interior, embodying an adjustment of said grants.

1691 Page 18, Lines 22–29, and Page 19, line 1. In lieu of these lines have the following substituted:

Defendants' witness Schwarm testified (Tr. 566) that in January 1922, the Government started the work on the adjustment, proceeding, first, to tabulate the place lands and then the indemnity lands. As the work was completed in the General Land Office by the clerks under Mr. Vandoren's direction, the sheets were turned over to the Company's representatives for checking with their records. Where the company found any discrepancies in areas a note was made of them and these notes were furnished to Mr. Vandoren, who then checked them back with the records of the General Land Office. Where he found the company's records were correct, proper adjustment was made in the adjustment that he was preparing and where the company found the General Land Office was correct, corrections were made on its own records.

Page 19. Add at end of line 10:

On cross-examination Mr. Schwarm testified that he couldn't tell whether the Tacoma Overlap had ever been included in the earned lands until Vandoren put it in in 1921 (Tr. 775).

Page 19. In copying this exhibit a line has been left out. In the line fourth from the bottom, following the word "were" should be added the following:

"earned by the Wallula-Tacoma line and that they were"

Page 21. In copying this exhibit a line has been omitted. In line 13, insert after "area" the following:

"within the limits of the later grant. This deduction reduces the area"

Page 24. Lines 4–10. Part of this tabulation is not accurately set up. It appears on the exhibit as follows:

Lost to grant:	
Prior to act of July 2, 1864:	
Entries and filings and withdrawals	165,975.65
Tacoma Overlap	637,500.46
Mineral surveyed and unsurveyed	1,205.81
Between act July 2, 1864, and definite location	224,461.10

1692 Page 25. Following line 22 insert:

Plaintiff's witness Vandoren further testified that the tentative adjustment of December 31, 1921, and the report of March 5, 1925, were both prepared under his supervision. The second one was prepared after the briefs had been filed by the railroad and Forest Service (25–26). In the tentative adjustment which he prepared on December 19, 1923, he did not deduct the Tacoma Overlap, but in the adjustment which he submitted to the Secretary of the Interior on the 5th of March, he did deduct it. He examined the so-called Jones Adjustment. The Tacoma Overlap was deducted in that adjustment (28).

Page 9. Line 24: Year should be 1907, not 1906.

1693 *Order approving statement of evidence*

The foregoing narrative statement of evidence, together with the additions and amendments thereto, is hereby allowed and approved as a true and complete statement of all the evidence received and proceedings had in the District Court essential or material to a decision of the questions presented by the appeal of defendants Northern Pacific Railway Company and others, and the same is hereby ordered filed as a statement of the evidence to be included in the record on appeal in the foregoing entitled cause as provided in paragraph (c) of Rule 75, Federal Rules of Civil Procedure.

Dated August 22, 1939.

J. STANLEY WEBSTER,
District Judge.

Due service of this instrument and receipt of copy thereof admitted this 21st day of August 1939.

NORMAN M. LITTELL,
WALTER L. POPE,
E. E. DANLY,
Counsel for Appellee.

1696 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Motion to strike defendants' proposed statement of evidence

Filed Aug. 21, 1939

The United States, plaintiff in the above-entitled cause, moves the court under Supreme Court Rule 10 (2) and Rules of Civil

Procedure 75 (c), (e), and (h) to strike from the files and record herein that certain instrument or paper filed herein the 21st day of August 1939 by the defendants and purporting to be a condensed narrative statement of the Northern Pacific Railway Company and other defendants of all the testimony received in proceedings had in the District Court essential or material to a decision of the questions presented by their appeal.

This motion is made for the reason and on the ground
1697 that defendants' purported narrative statement does not truly disclose what occurred in this court and it should not be permitted to become a part of the record on appeal herein for the following reasons:

(1) There should be but one narrative statement filed in this case. All of the relevant testimony which has been included in defendants' statement and which is contained in the transcript of testimony or in the exhibits filed in the case has been included in the narrative statement filed by the plaintiff. There is no justification for the filing of a second statement by the defendants reproducing testimony and exhibits which are already contained in plaintiff's statement.

(2) An orderly statement in compliance with the rules cannot be made if defendants' statement be accepted. Approximately 2,000 pages of testimony were taken and some 500 voluminous exhibits received in evidence. The witnesses were called in an orderly manner, identifying the exhibits introduced. Many of the exhibits bear on several points and the use of two statements would necessitate a duplication in the analysis of such exhibits or a separate analysis of parts of such exhibits.

(3) The statement proposed by defendants is not a narrative statement. It does not in any sense disclose what occurred in the trial of this cause. The statement is a series of argumentative conclusions built up from facts taken from the record and from other sources not a part of the record. The testimony is not given in its chronological order or with reference to its
1698 proper relation to the balance of the testimony. The exhibits do not appear summarized in one place. They do not appear at all, but conclusions as to what a certain exhibit will "show" appear throughout the statement in as many as four different places.

(4) The statement contains large quantities of extraneous material which is not a part of the record in the case. For example, it contains a statement on page 27 that Vol. 1, p. 1, of the Joint Committee Record, shows that the Joint Congressional Committee on Investigation of the Northern Pacific Railroad Land Grants met at 10:00 o'clock, March 18, 1925, and quotes excerpts taken from the Joint Committee Record, which do not form a

proper part of a narrative statement of evidence taken in this case. On page 15 in referring to the Jones Adjustment the remark is made, "No action with respect to said adjustment was taken by the Secretary of the Interior." There is nothing in the transcript of testimony from which this is taken. There are other places in the statement where similar statements are made.

(5) The statement is argumentative and biased.

(6) The statement is repetitious. No exhibit is completely summarized in one place, but is referred to many times.

(7) The statement is not in proper form. There is no way of ascertaining whether particular parts of the statement are
1699 testimony of the witnesses, comments of the writer, or material taken from an exhibit.

Dated August 21, 1939.

NORMAN M. LITTELL,
Assistant Attorney General.
WALTER L. POPE,
E. E. DANLY,
Special Assistants to the Attorney General.

1700 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Proposed amendments to defendants' narrative statement

Filed Aug. 22, 1939

Comes now the plaintiff United States of America, and without waiving its objection to the entire proposed narrative statement of the defendants, stated in plaintiff's motion to strike the same, and after the Court has announced that it will deny plaintiff's said motion, presents and proposes the annexed amendments to the narrative statement of the evidence, filed and proposed by the defendants herein the 21st day of August 1939.

Plaintiff represents to the Court that the record herein discloses that said amendments are necessary in order to state correctly the proceedings in this Court with respect to the so-called Tacoma Overlap point, and moves the Court to require their addition to said proposed narrative statement.

NORMAN M. LITTEL',
Assistant Attorney General,
WALTER L. POPE,
E. E. DANLY,
Special Assistants to the Attorney General,
Counsel for Plaintiff.

1701 PROPOSED AMENDMENTS TO DEFENDANTS' STATEMENT OF EVIDENCE ON TACOMA OVERLAP

Page 4. Insert before last paragraph:

Plaintiff's witness Barber (Tr. 289) testified that the area of the odd-numbered sections within the overlap is 637,580.99 acres. The figure shown at the top of Government Exhibit 201 as being "Gross Area within Limits" includes the whole area of the odd-numbered sections within the conflict. Excluding the conflict, the area of the grant is shown to be 1,761,912.26 acres. So far as can be determined from the records of the General Land Office, the conflicting area of the Tacoma Overlap was not considered or treated as a part of the grant of 1870 and it was not included as a part of the area earned under the grant of 1870. It was treated as earned under the grant of 1864.

Page 4. Line 8—32,354.86, not .46. Instead of "the remaining 32,354.46 acres were lost to the grant of 1864 for one or another of the reasons specified in Section 3 of said act," put "and the remaining 32,354.86 acres were lost to the company as place lands because they were disposed of under filings and entries."

Page 5. Add:

(Mr. Schwarm—cross-examination.)

Q. (Referring to land within Tacoma Overlap.) It is a fact in your estimate of base in these hearings you haven't used any of that land as base?

A. We have not—no (1476).

Page 6. End of page, add:

"On cross-examination Mr. Schwarm testified that all of the above lists except Chehalis 61 for 40 acres were filed before the decision of the Secretary of the Interior in 25 L. D. 511, dated December 20, 1897, holding that the two grants had to be administered separately; that prior to the time of that decision the company assigned losses under the 1864 grant to take land within the limits of the 1870 grant and vice versa; and that all of these lands for which indemnity lands were selected were lost to settlers."

1702 Page 7. Insert in line 12, following "Tr. 778":

There are only two lists describing the lands within the first indemnity limits of both grants selected in lieu of losses occurring within the Tacoma Overlap, colored in green. These lists are Olympia List 28 and Vancouver List 41 (Tr. 780).

Insert in line 13 following "Tr. 782":

"It was for 1,504 acres. It was ten years between the time of filing of the selection list and the decision of 25 L. D."

Page 7. Insert in line 22, following "July 1, 1898":

"Olympia List 28 was approved by the local land office on October 25, 1887."

By Mr. BIGGS. Our records show it was April 3, 1895—1,504.14 (date of patent, Olympia List 28).

By the WITNESS. I couldn't dispute that. From what I can tell it would be approximately correct. All I have is the number of the patent here.

By Mr. FROST. Then may it be understood we can verify the time that patent was issued for our Olympia List 28?

By the MASTER. Yes (783–784).

Page 8. Insert in line 2, following "Company":

"That is the full list."

Add before the word "All" in the same line:

"The lists for"

Page 8. Insert following line 4:

Plaintiff's witness Barber testified that Government Exhibit 205 is a certified copy of the Jones Adjustment submitted to the Department of the Interior on March 26, 1906. It contains a statement of the adjustment of the grant under the Resolution of 1870 as to the States of Washington and Oregon. The area of the grant in the State of Washington under the Resolution of 1870 is shown by this statement to be 1,765,582.60 acres. The gross area of the primary limits under the grant of 1870 in the State of Washington (Government Exhibit 201) is
1703 2,399,493.25 acres. The area, omitting The Tacoma Overlap, shown by Exhibit 201, is 1,761,912.26 acres. The figures are approximately the same, there being a slight difference between that figure and the figure of the Jones Adjustment of about 4,000 acres. It is apparent from this that the area of the Tacoma Overlap was not included in the Jones Adjustment as a part of the area under the grant of 1870.

Government Exhibit 205 is a certified copy of a letter from the Commissioner of the General Land Office to the Secretary of the Interior, dated March 26, 1906, stating that he is submitting tabulated statements showing the results of the readjustment of the grants of 1864 and 1870 directed by the Secretary's letter of February 29, 1904. It states that the grant of 1870 is shown to be deficient by 532,029.73 acres. Attached to this letter are tabulations containing the following figures relating to the grant of 1870 in the States of Washington and Oregon:

Total area of the grant in the primary limits in Washington	1,765,582.60
Total losses to the grant in Washington	412,579.35
Chargeable as indemnity	310,667.99
Deficiency in Washington	101,911.36
Deficiency in Oregon	430,118.37

Plaintiff's witness Barber further testified (309) that the second indemnity belt in Washington was laid down the latter part

of 1906, that it is just merely a guess, that the laying down of these limits was probably due to the fact that the Jones Adjustment disclosed a deficiency, and without regard to whether there was a deficiency in the grant on the date of final location, the limits were laid down. That was only witness's guess as to the reason.

Page 8. We should like to add more of the testimony and the statement made by Mr. Danly. Omit the identification of Government Exhibit 206 (11.5–10), and insert the following:

Plaintiff's witness Barber further testified that he prepared a year-by-year sheet for the State of Washington under the 1870 grant, Government Exhibit 206. The facts reflected by this exhibit are shown by the records of the General Land Office. This exhibit shows the area of the losses occurring prior
1704 to July 2, 1864, to be 169,174.22 acres, and the area of the losses occurring between the date of the Act of July 2, 1864, and the date of definite location to be 224,386.10 acres, a total of 393,560.32 acres. This represents the total loss to the company in the State of Washington under the grant of 1870 as of the date of final location, September 22, 1882. The total of the vacant lands, both surveyed and unsurveyed in the first indemnity limits in Washington on the date of the final location of the road, September 22, 1882, is 432,509.79 acres. On the date of final location the area of vacant lands exceeded the total losses within the State by 38,949.47 acres. In his opinion there was no authority for laying down a second indemnity belt in the State of Washington because at the time of the final location there was land available in the first indemnity limits over and above the amount necessary to satisfy all losses in the State of Washington (294–297).

By Mr. DANLY. Plaintiff's exhibits with reference to the grant of 1870 are all offered showing the status of the grant assuming that authority existed for laying down the second indemnity belt. The reason for doing that was because to change the tabulations and leave out of them entirely any reference to the second indemnity belt, would add confusion to the Government's position; the Government's position being at all times that there was no justification for laying down the second indemnity belt; that it was wholly unauthorized, and that the comparatively small area of lands which have been patented under the grant in the second indemnity belt was erroneously patented and should be compensated for.

Mr. FROST. I did not hear that last statement.

The SPECIAL MASTER. That the small area of lands patented in the second indemnity belt were erroneously patented and should be compensated for.

Mr. DANLY. The acreage is 1,191.59 acres patented and 200 acres selected, making a total of 1,391.59 acres.

Mr. FROST. Was that relief asked for in the amended complaint?

Mr. DANLY. No; it was not.

Mr. FROST. So that it is not until this time it has been the position of the plaintiff that the railway company had no right to these 1,300 or 1,200 or 1,100 acres in the second limits?

Mr. DANLY. That is not true, Mr. Frost. We have taken the position all the time, as the records will show, that the second indemnity belt in the State of Washington was unauthorized.

However, in the drafting of the bill of complaint, which
1705 of course was a tremendous job, we did not include as an item among the losses that we were asking compensation for, lands which we claim were erroneously patented in the grant of 1870 in the second indemnity belt in the State of Washington.

I am not just sure that I have made myself clear about the reason for offering these exhibits containing the second indemnity belt.

The SPECIAL MASTER. I understand it perfectly.

Mr. DANLY. Of course we hope that the fact that they are offered in that way shall not be taken in anywise as an indication of weakness on our part in our position.

The SPECIAL MASTER. Indications of weakness do not make any difference. It is going to come out in the wash somehow, without reference to indications. The only indications of weakness that I shall pay any attention to are in argument. I frequently detect counsel referring to something sometimes that they do not believe themselves.

Mr. DANLY. We realize that we take some risk of being misunderstood when we do submit tabulations containing a second indemnity belt and the status of it when we contend that it was wholly unauthorized. But I think I have made it clear.

The SPECIAL MASTER. Yes.

Mr. DANLY. The explanation of it is that to change the set-up would be a tremendous job and would perhaps increase confusion.

Page 9. Line 18. Add:

"It shows the total prior losses to be 106,735.24 acres."

Page 10. In lines 14-18 omit last sentence which reads:

"During all of said period said lands so patented or selected in said second indemnity limits of Washington have been carried on the records of the United States Land Department as properly patented and selected down to December 31, 1935".

This statement does not appear on any exhibit. The pertinent facts from N. P. Exhibit 139 and Government Exhibit 206 have already been set out in this paragraph.

Page 11. Line 15. Omit: "Said plaintiff's exhibits 206, 208, and 210 show that on and immediately prior to March 1,
1706 1898, December 18, 1902, and August 27, 1906, the dates of said withdrawals, the deficiency in the entire grant and its status are as follows:" and insert:

It shows the total area lost to the grant to be 821,748.55 acres.

Page 11. Column one entitled "total area lost to grant including Tacoma Overlap 1,459,329.54" should be omitted. The Government exhibits do not treat the Tacoma Overlap as a loss. Further, this figure does not appear on any of the exhibits. It may be obtained by adding the area of the Tacoma Overlap to the total area shown by Government Exhibit 210 as lost to the grant, which is given in the preceding paragraph.

Add to this page:

Government Exhibit 206 shows the vacant surveyed and unsurveyed land and the area disposed of to the company in the second indemnity limits in Washington as follows:

Date	Disposal to company		Surveyed	Vacant	Unsurveyed
	Indemnity	Other acts			
Sept. 22, 1882			39,045.72		268,692.07
Dec. 31, 1884			21,683.94		249,050.66
Dec. 31, 1885			22,953.23		247,930.66
Dec. 31, 1886			22,523.94		247,650.66
Dec. 31, 1887			18,045.58		247,650.66
Dec. 31, 1888			12,473.98		247,269.28
Dec. 31, 1889			6,861.90		244,167.87
Dec. 31, 1890			3,248.23		237,566.65
Dec. 31, 1891			2,471.68		233,334.14
Dec. 31, 1892			940.55		232,272.14
Dec. 31, 1893			980.55		231,938.72
Dec. 31, 1894			1,020.55		230,572.43
Dec. 31, 1895			1,940.55		224,485.96
Dec. 31, 1896			1,940.55		223,364.94
Dec. 31, 1897			7,528.33		217,159.51
Dec. 31, 1898			854.30		19,883.08
Dec. 31, 1901			929.94		18,896.92
Dec. 31, 1902			433.63		7,243.08
Dec. 31, 1905		31.20	4,069.87		
Dec. 31, 1906	311.59	31.20	162.43		
Dec. 31, 1913	391.59	170.12	82.43		
Dec. 31, 1916	1,151.59	170.12	82.43		
Dec. 31, 1917	1,231.59	170.12	2.43		
Dec. 31, 1923	1,391.59	170.12	2.43		
Dec. 31, 1935	1,391.59	170.12	2.43		

1707 Government Exhibit 206 shows that a total of 220,102.78 acres was selected by the company in the first indemnity limits in Washington and 4,771.06 acres received under lieu Acts in the same limits. Government Exhibit 208 shows a total of 5,002.39 acres was received in the first indemnity limits in Oregon.

Page 12. Lines 17–22, omit:

"Said exhibit shows at the dates of said respective withdrawals the railroad company had subsequent losses in the State of Washington in an amount more than sufficient to select all then available vacant surveyed lands in second indemnity limits in Washington on and before each respective date of withdrawal as follows:"

Insert in lieu of the sentence to be stricken the following:

"Said exhibit shows the unused subsequent losses in Washington as of particular dates to be as follows:"

Page 13. Following the tabulation in line 12, insert:

Northern Pacific Exhibit 140 shows the total lands vacant, surveyed, and available as indemnity on March 1, 1898, to be 61,906.07 acres.

Then insert the following paragraph:

Government Exhibit 209 shows the subsequent losses at the date of final location of the road for Washington to be 224,386.10 acres and for Oregon, 321,210.21 acres. It shows the amount of losses used to secure indemnity lands as of particular years as follows:

	Base used, Washington
December 31, 1884	13,228.05
December 31, 1885	58,633.27
December 31, 1887	6,812.69
December 31, 1888	3,583.09
December 31, 1891	4,818.02
December 31, 1892	2,016.11
December 31, 1893	200.00
December 31, 1895	6,633.54
December 31, 1896	1,875.87
	Base used, Oregon
December 31, 1921	43,061.40
December 31, 1922	40.00
December 31, 1923	40.00

Government Exhibit 209 shows that the vacant lands in Washington on December 31, 1897, in the second indemnity limits, amounted to 224,687.84 acres.

1708 Page 13. Add at end of line 19:

It shows the unused prior loses for Oregon to be 94,189.17 acres and for Washington, 61,686.83, a total of 155,876 acres. It also contains an item entitled "Improperly used outside of limits" composed of "selection approved 721.16" and "Relinquished, Act 1898, 432.26," for which Washington prior losses were designated.

Plaintiff's Exhibit 216, identified by plaintiff's witness Barber (318), is a tabulation showing the use of subsequent losses. It

contains an item designated "Improperly used outside of limits" composed of 630.44 acres of selections approved and 1,126.46 acres of land relinquished under the Act of 1898 for which Washington subsequent losses were designated, and 40 acres relinquished under the Act of 1898 for which Oregon subsequent losses were designated.

Page 16. Following line 3 the following insert should be made:

Plaintiff's witness Barber testified that:

He had a diagram prepared by the Survey and Map Division of the General Land Office (Government Exhibit 291) showing the lands involved in the Winona Case, 113 U. S. 618 (1416). It is prepared from the official railroad diagram showing the lands involved in that case (1418).

By the Master: It will be admitted to be used as illustrating the case to which it refers (1419).

(Government Exhibit 291 shows the lines of the Winona and St. Peter and Minnesota Central Railroads as they intersect each other, with six and ten mile limits laid down for each grant. Certain of the sections are cross-hatched in red and designated on the diagram "Odd sections within overlap of 6 miles and 10 miles granted limits of Winona and Saint Peter and Minnesota Central (formerly Minnesota and Cedar Valley) Railroads." This exhibit is impractical of inclusion in a narrative statement or printed record and will be certified in its original form pursuant to Supreme Court Rule 10 (4).

Page 16. Line 19: "Offers" should be offered".

Page 16. Insert in line 27 after "(Tr. 15)":

It states that after due consideration of the entire matter in the light of the briefs and arguments filed, a report will be submitted to the Secretary of the Interior, embodying an adjustment of said grants.

1709 Page 18, Lines 22–29, and page 19, line 1. We should like to supplement this statement to include more of the testimony, and in lieu of these lines should like to have the following substituted:

Defendants' witness Schwarm testified (Tr. 566) that in January 1922 the Government started the work on the adjustment, proceeding, first, to tabulate the place lands and then the indemnity lands. As the work was completed in the General Land Office by the clerks under Mr. Vandoren's direction, the sheets were turned over to the Company's representatives for checking with their records. Where the company found any discrepancies in areas a note was made of them and these notes were furnished to Mr. Vandoren, who then checked them back with the records of the General Land Office. Where he found the company's

records were correct, proper adjustment was made in the adjustment that he was preparing and where the company found the General Land Office was correct, corrections were made on its own records.

Page 19. Add at end of line 10:

On cross-examination Mr. Schwarm testified that he couldn't tell whether the Tacoma Overlap had ever been included in the earned lands until Vandoren put it in in 1921 (Tr. 775).

Page 19. In copying this exhibit a line has been left out. In the line fourth from the bottom, following the word "were" should be added the following:

"earned by the Wallula-Tacoma line and that they were"

Page 21. In copying this exhibit a line has been omitted.

In line 13, insert after "area" the following:

"within the limits of the later grant. This deduction reduces the area"

Page 24. Lines 4–10. Part of this tabulation is not accurately set up. It appears on the exhibit as follows:

Lost to grant prior to act of July 2, 1864:	
Entries and filings and withdrawals	165,975.65
Tacoma Overlap	637,500.46
Mineral surveyed and unsurveyed	1,205.81
Between act July 2, 1864, and definite location	224,461.10

1710 Page 25. Following line 22 insert:

Plaintiff's witness Vandoren further testified that the tentative adjustment of December 31, 1921, and the report of March 5, 1925, were both prepared under his supervision. The second one was prepared after the briefs had been filed by the railroad and Forest Service (25–26). In the tentative adjustment which he prepared on December 19, 1923, he did not deduct the Tacoma Overlap, but in the adjustment which he submitted to the Secretary of the Interior on the 5th of March, he did deduct it. He examined the so-called Jones Adjustment. The Tacoma Overlap was deducted in that adjustment (28).

Page 9. Line 24: Year should be 1907, not 1906.

Page 9. Line 28: Omit paragraph reading:

Said Exhibit 208 Revised shows that from the period 1907 to 1935 inclusive said lands which were so selected in said second indemnity limits of Oregon have been carried on the records of the United States Land Office as having been properly selected and charged to the grant of 1870.

This statement does not appear on Exhibit 208. The pertinent facts from Exhibit 208 have already been set out on the preceding page.

1711 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Order on defendants' motion to strike from plaintiff's narrative statement of evidence and on plaintiff's motion to strike defendants' proposed statement of evidence

(Filed Aug. 22, 1939)

I

Motion of defendants to strike from narrative statement proposed by United States certain matter, having been considered, it is ordered that paragraphs 1 and 2 of said motion be sustained and the matter referred to therein be, and is hereby, stricken from said proposed narrative statement of evidence.

II

The corrections and additions referred to in paragraphs 3 and 4 of said motion having been made in said narrative statement, and defendants having withdrawn the same, it is ordered that said paragraphs 3 and 4 be dismissed.

III

Plaintiff's motion to strike defendants' narrative statement having been considered, it is ordered that the same be and is hereby denied.

1712 IV

Plaintiff's proposed narrative statement, with the exception of the portions stricken therefrom by this order, together with defendants' proposed narrative statement as amended and supplemented, together are certified and approved as a true and complete statement of all of the evidence and proceedings had in District Court essential or material to a decision of the questions presented by the respective appeals by plaintiff and defendants, and the same is hereby ordered filed and included in the record on appeal of this cause as provided by paragraph (c) of Rule 75 of the Federal Rules of Civil Procedure.

Dated August 22, 1939.

J. STANLEY WEBSTER,
District Judge.

1713 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Stipulation concerning transmission of exhibits

Filed Aug. 21, 1939

It is hereby stipulated by and between the parties hereto that the original exhibits offered or received in evidence in the above-entitled cause should be made available for inspection in the Supreme Court and that the district court may make an order for the transporting of such exhibits to the Supreme Court in accordance with Supreme Court Rule 10, par. 4.

Dated August 21, 1939.

NORMAN M. LITTELL,
WALTER L. POPE,
E. E. DANLY,
Counsel for Plaintiff.

L. B. DAPONTE,
WHITE & CASE,
TAYLOR, BLANC, CAPRON & MARSH,
Counsel for Defendants.

1714 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Order to send up original exhibits

Filed Aug. 21, 1939

It appearing to the court that it is proper that the original exhibits offered or received in evidence in the trial of this cause should be inspected in the Supreme Court, it is ordered that the stipulation of the parties that such exhibits may be transported to the Supreme Court be and the same is hereby approved, and it is ordered that, in addition to the transcript of the record on appeal in this suit, the clerk of this court shall transmit to the clerk of the Supreme Court of the United States at Washington the original exhibits offered or received in evidence in this suit, to be by him safely kept and returned to this court upon the final determination of this suit in the Supreme Court.

Dated August 21, 1939.

J. STANLEY WEBSTER,
District Judge.

1715 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Praecipe for designation of record on appeal of the United States

Filed Aug. 22, 1939

To the clerk of the above-named court:

The United States of America, appellant, desires the following portions of the record in the above-entitled cause to be incorporated into the transcript of record on its appeal to the Supreme Court of the United States, namely:

1. Plaintiff's complaint, filed July 31, 1930.
2. Answer of defendant Bankers Trust Company, filed December 5, 1930.
3. Answer of defendant City Bank Farmers Trust Company, filed January 9, 1931.
4. Exhibits A, B, C, D, E, F, M, and N, attached to plaintiff's complaint and filed March 11, 1931.
5. Stipulation concerning amendments to complaint, filed June 25, 1931.

1716 6. Order approving above stipulation, filed June 25, 1931.

7. Amended and supplemental answer of defendant Northern Pacific Railway Company, filed July 18, 1931.
8. Amended and supplemental answer of defendant Northwestern Improvement Company, filed July 18, 1931.
9. Disclaimer of defendant Guaranty Trust Company, filed July 18, 1931.
10. Motion for hearing on points of law, filed July 18, 1931.
11. Supplemental answer of defendant City Bank Farmers Trust Company, filed July 22, 1931.
12. Supplemental answer of defendant Bankers Trust Company, filed July 24, 1931.
13. Supplemental answer of defendant Bankers Trust Company, filed July 28, 1931.
14. Motion of defendant Bankers Trust Company for hearing before trial of Affirmative Defenses, filed August 24, 1931.
15. Reply to amended and supplemental answer of defendant Northern Pacific Railway Company, filed December 19, 1931.
16. Reply to amended and supplemental answer of defendant Northwestern Improvement Company, filed December 19, 1931.
17. Reply to the answer of defendant Bankers Trust Company, as supplemented, filed December 19, 1931.
18. Disclaimer of defendant Northern Pacific Railroad Company, filed January 18, 1932.

19. Motion of defendant Northern Pacific Railway Company, and others, to strike from the files certain replies, filed January 18, 1932.

20. Motion of defendant City Bank Farmers Trust Company for separate hearing before trial, filed February 4, 1932.

1717 21. Motion to strike disclaimer of Northern Pacific Railroad Company, filed February 13, 1932.

22. Petition for appointment of Master, filed February 24, 1932.

23. Order appointing Frank H. Graves, Special Master, filed February 25, 1932.

24. Notice of withdrawal of motion to strike replies, filed May 7, 1932.

25. Answer of defendant Northern Pacific Railroad Company, filed May 9, 1932.

26. Motion to call up and dispose of defenses in point of law, filed May 9, 1932.

27. Order of reference to Frank H. Graves, Special Master, of defenses in point of law, filed May 24, 1932.

28. Reply to answer of defendant Northern Pacific Railroad Company, filed June 17, 1932.

29. Report of Frank H. Graves, Special Master, filed May 31, 1933.

30. Order extending time to file exceptions to above report, to July 10, 1933, filed June 12, 1933.

31. Exceptions of defendants Northern Pacific Railway Company, and others, to the report of the Special Master of May 31, 1933, filed June 20, 1933.

32. Exceptions of defendant Bankers Trust Company to report of Special Master of May 31, 1933, filed June 20, 1933.

33. Exceptions of defendant City Bank Farmers Trust Company to report of Special Master of May 31, 1933, filed June 20, 1933.

34. Exceptions of Plaintiff to report of Special Master of May 31, 1933, filed July 8, 1933.

1718 35. Stipulation correcting numerals in Master's report, filed January 11, 1934.

36. Order approving above stipulation, filed January 11, 1934.

37. Stipulation, amending answer of defendant Bankers Trust Company, filed January 11, 1934.

38. Order approving stipulation to amend above answer, filed January 11, 1934.

39. Opinion of the court, adopting Master's report, filed September 9, 1935.

40. Order adopting Master's report and dismissing portions of the complaint, filed October 3, 1935.

41. Exceptions of plaintiff, filed October 3, 1935.

42. Exceptions of defendant, filed October 3, 1935.

43. Notice and affidavit to amend order of October 3, 1935, filed December 31, 1935.

44. Order amending order of October 3, 1935, filed January 29, 1936.

45. Motion to amend order of reference, filed April 21, 1936.

46. Order amending order of reference, filed April 21, 1936.

46a. Plaintiff's motion to amend complaint, filed Feb. 5, 1937.

47. Report of Special Master, filed July 26, 1937.

48. Exceptions of defendants, Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company to report of Special Master of July 26, 1937, filed August 9, 1937.

49. Supplemental exceptions of Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company to report of Special Master of July 26, 1937, filed August 11, 1937.

1719 50. Plaintiff's exceptions to the Master's report, filed August 13, 1937.

51. Exceptions of defendants, Bankers Trust Company and City Bank Farmers Trust Company, to report of Special Master of July 26, 1937, filed August 13, 1937.

52. Supplemental exceptions of defendant Bankers Trust Company and City Bank Farmers Trust Company to report of Special Master of July 26, 1937, filed August 13, 1937.

53. Order on exceptions of Master's report, filed March 22, 1938.

54. Stipulation concerning defendants' motion to re-refer and amendment to complaint, filed July 26, 1938, and order thereon.

55. Motion of plaintiff and notice of motion to make and adopt certain conclusions of law (based on subdivision XIV of the amended and supplemental answer of Northern Pacific Railway Company), filed June 26, 1939.

56. Order approving stipulation of June 26, 1939, filed June 26, 1939.

57. Plaintiff's request for additional findings and conclusions on Crow Losses, filed June 26, 1939.

58. Plaintiff's request for additional findings and conclusions on Right to Compensation, filed June 26, 1939.

59. Defendants' motion for the adoption of the Master's report of May 31, 1933, as findings and conclusions of the court, filed June 26, 1939.

60. Minutes of the court of June 26, 1939, in full, showing:

1. Order refusing plaintiff's request for findings of fact and conclusions of law on Crow Losses.

2. Order denying plaintiff's motion to make and adopt
1720 certain conclusions of law (based on subdivision XIV of the amended and supplemental answer of Northern Pacific Railway Company).

3. Order denying plaintiff's request for additional findings of fact and conclusions of law on Right to Compensation.

4. Order denying motion for the adoption of the Master's report of May 31, 1933, as findings and conclusions of the court.

61. Defendants' objections to findings and decree and order overruling the same, filed June 27, 1939.

62. Plaintiff's objections to proposed findings and conclusions and order overruling the same, filed June 27, 1939.

63. Findings of fact and conclusions of law, filed June 27, 1939.

64. Decree, filed June 27, 1939.

65. Petition for appeal by the United States, filed August 21, 1939.

66. Assignment of errors by the United States, filed August 21, 1939.

67. Jurisdictional statement required by Rule 12 of the Supreme Court and filed on behalf of the United States August 21, 1939.

68. Order allowing appeal of the United States, filed August 21, 1939.

69. Citation on appeal of the United States, issued August 21, 1939, with acknowledgments of service thereon on the part of the defendants, filed August 21, 1939.

70. Proof of service of papers required by Rule 12, par. 2, filed August 21, 1939.

1721 71. Stipulation as to exhibits attached to plaintiff's complaint and to answer of defendant Northern Pacific Railway Company, filed August 21, 1939.

72. Stipulation as to schedules attached to the decree, filed August 21, 1939.

73. Stipulation concerning transmission of exhibits, filed August 21, 1939.

74. Order to send up original exhibits, filed August 21, 1939.

75. Narrative statement of the testimony, as filed by the United States August 21, 1939.

76. Motion to strike certain matter from and to supplement appellant's statement of evidence, filed August 21, 1939.

77. Narrative statement of Northern Pacific Railway Company and others, filed August 21, 1939, with the amendments and corrections ordered August 22, 1939.

78. Motion to strike defendants' proposed statement of evidence.

79. Proposed amendments to defendants' narrative statement, filed August 22, 1939.

80. Order of court concerning narrative statements of the testimony and motions concerning the same, filed August 22, 1939.

81. This praecipe, with acknowledgment of service thereof.

82. Your certificate to the transcript of record.

Dated August 22, 1939.

NORMAN M. LITTELL,
Assistant Attorney General.
WALTER L. POPE,
E. E. DANLY,
Special Assistants to the Attorney General.

Service of the foregoing Praecipe and receipt of copy thereof is acknowledged this 22nd day of August, 1939.

L. B. DAPONTE,
D. R. FROST,
WHITE & CASE,
TAYLOR, BLANC, CAPRON & MARSH,
Counsel for defendants Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company, Bankers Trust Company, Guaranty Trust Company, and City Bank Farmers Trust Company, appellees herein.

1722 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Praecipe for transcript of record

Filed Sept. 1, 1939

To the CLERK OF THE UNITED STATES DISTRICT COURT
For the Eastern District of Washington,
Northern Division:

Plaintiff herein having served and filed its praecipe for transcript of the record wherein are included all the documents pertinent to the appeal of the undersigned defendants, except those hereinafter mentioned, therefore please prepare, as provided by Rule 10 of the Supreme Court of the United States, the transcript on appeal of these defendants to said Supreme Court and include therein the following papers, to wit:

(1) Amended certificate of Special Master dated January 14, 1935.

(2) Motion of defendants Northern Pacific Railway Company, et al., filed December 10, 1937, with affidavit of J. M. Hughes attached thereto, and order filed December 18, 1937, denying said motion.

1723 (3) Stipulation as to contents of General Lien Mortgage of Northern Pacific Railway Company, filed August 22, 1939.

(4) Statement of points on which appellants Northern Pacific Railway Company et al., will rely on appeal.

(5) Petition of these defendants for appeal.

(6) Order allowing appeal.

(7) Cost bond of defendants on appeal.

(8) Assignment of errors of these defendants.

(9) Jurisdictional statement of defendants.

(10) Notice served on appellee under Supreme Court Rule 12, with proof of service thereof (Omitting therefrom the attached documents).

(11) Citation.

(12) This praecipe.

L. B. DAPONTE,
F. J. MCKEVITT,
D. R. FROST,

Attorneys for Defendants, Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company.

WHITE & CASE,

Attorneys for Defendant, Bankers Trust Company.

TAYLOR, BLANC, CAPRON & MARSH,

Attorneys for Defendant, City Bank Farmers Trust Company.

1724 In United States District Court

[Title omitted.]

[File endorsement omitted.]

Due service of the Praecipe for Transcript of Record of defendants, Northern Pacific Railway Company et al and receipt of copy thereof, is hereby admitted this 31 day of August 1939.

NORMAN M. LITTELL,
E. E. DANLY,
WALTER L. POPE,
Counsel for Plaintiff-Appellee.

1725 [Clerk's certificate to foregoing transcript omitted in printing.]

1727 In the Supreme Court of the United States

October Term, 1939

No. 476

Statement of points to be relied upon and designation of parts of record to be printed

Filed Nov. 4, 1939

Definite statement of points

In compliance with Rule 13, par. 9, the United States submits this as the definite statement of the points on which the United States intends to rely in support of the review asked of the Supreme Court in the above-entitled case.

The points contested by the defendants and ruled against the United States in the District Court are as follows, namely:

1. The awards to the defendants are based in large part upon classifications of mineral and nonmineral lands which were a pretense and untrue, to the injury of the United States, procured by the defendants by the practice of fraud and corruption on the commissioners making the pretended classifications and by concealing from the Secretary of the Interior the known falsity of the reports of the commissioners; and without these vicious
1728 classifications no basis has been shown for a mineral and nonmineral determination without which the Railway Company never showed the existence of the conditions on which the United States had agreed to let the Railroad Company have these indemnity lands and without this, these awards could not be made.

2. The Act of July 2, 1864, 13 Stat. 365, became void on July 3, 1866, and so remained by section 19 thereof because the Northern Pacific Railroad Company did not obtain bona fide subscriptions to the stock of said company to the amount of two million dollars with ten per centum paid in, within two years after the passage and approval of the act.

3. "Agricultural lands" in section 3 of this act meant agricultural lands and not any other nonmineral lands; and the awards to the defendants have been made erroneously to the contrary.

4. The railroad contemplated by the act has never been completed in substance; and the time therefor has long since expired; and such completion was by the express words of section 3 of the act a condition to the right to any of the indemnity

lands, and, therefore, at the time the indemnity lands were withdrawn the Railway Company had no right to compel the United States to convey them and these withdrawals were and are valid.

5. The awards to the defendants erroneously include credits for 1,400,000 additional acres because the Railroad Company constructed by an unnecessarily circuitous route in Washington and not by the most eligible route from Lake Superior to Puget Sound as required by the Act of July 2, 1864.

6. The United States is not barred from any of its submissions by statutes of limitations, res adjudicata, laches, estoppel, acquiescence, waiver, or otherwise.

1729 7. The decree of June 27, 1939, is in error in the accounting balance for its mistreatment of submissions 1 to 6, supra, and for additional reasons going to parts of the award in the particulars following, namely:

A. The Railway Company is not entitled to compensation for the 1,453,061 acres described in the decree because it has not shown that it would have selected and obtained all the lands in the forest reserve if they had not been withdrawn and it has greatly profited by the mistakes made as to the withdrawals of lands under the Act of July 2, 1864, and these facts were disregarded erroneously in arriving at the rights defined by the decree of June 27, 1939.

B. The lands in the Indian reservations, by the Treaties of 1851 and 1855, outside the right of way, were not granted to the Northern Pacific Railroad Company and they should have been charged to the Railway Company in the accounting to the extent of the excess of them over obtainable indemnity lands.

C. The Act of June 25, 1929, did not authorize the making of a credit to the Railway Company in the accounting for the lands in the Northern Cheyenne Indian Reservation.

D. It was error in the District Court to rule that lands located within the Crow Indian Reservation as defined by the Treaty of May 7, 1868, were losses subsequent to July 2, 1864, from the place lands and, therefore to award to the defendants com-
1730 pensation on account of lands in the second indemnity limits in Montana and not to charge the defendants with additional lands heretofore received by the defendants within these second indemnity limits.

E. The District Court erred in disregarding the unsurveyed public lands remaining in the indemnity limits after withdrawals for Government purposes in determining whether or not those withdrawals were valid.

F. In determining the question of the validity of the withdrawals for Government purposes of lands in the second indemnity belt in Idaho the District Court erred in disregarding subsequent restorations to the public domain and subsequent surveys within those indemnity limits which increased the area of public lands in the limits to such an extent that it exceeded the area of the unsatisfied losses in Idaho satisfiable in such limits.

G. It was error in the District Court to award compensation on account of lands withdrawn within the indemnity limits, on which homesteaders filed prior to June 5, 1924, and received patents thereafter.

H. It was error in the District Court to strike out Subdivisions VII, VIII, XIII, and XXXII of the bill and, thereby, to deprive the United States of an accounting of the profits received by the Northern Pacific Railroad Company in the sale of lands which should have been opened to settlers at $2.50 an acre,
1731 and therefore received as profits from its violation of its
— contractual obligations to the United States under the Act of July 2, 1864, and to ignore the values derived by the company from mistakes in erroneous withdrawals between 1870 and 1890, on the filing of general route maps and maps of definite location.

8. The Joint Resolution of May 31, 1870, did not authorize the establishment of second indemnity limits opposite the railroad between Portland, Oregon, and Tacoma, Washington, and this is an additional ground, ruled against in the District Court, which supports the action of the District Court in denying the Railway Company's claim to compensation on account of lands in such second indemnity limits in the State of Washington.

These submissions are believed to comprehend, in outline, the fifty-five assignments of error for the United States (R. ——), and to be comprehended by those assignments; but in view of the mandates to the Attorney General in the Act of June 25, 1929, c. 41, 46 Stat. 41, it would be inappropriate for the Attorney General to waive any of the assignments of error and no such waiver is made; but it is believed that the above comprehensive simplification will render it unnecessary for the court to deal specifically with the separate assignments.

Designation of record

The United States designates to be printed all of the record except the following (page references are references to pages in the typewritten transcript):

		Page
1132	1. All the exhibits, namely, A, B, C, D, E, F, M, and N, to the Bill of Complaint	101
	2. Exhibit 1, General Lien Mortgage	324
	3. Stipulation re Exhibits attached to pleadings	425
	4. Reply to Amended and Supplemental Answer of Northern Pacific Railway Company	513
	5. Amended and Supplemental Answer of Northwestern Improvement Company	530
	6. Reply to Amended and Supplemental Answer of Northwestern Improvement Company	531
	7. Reply to Answer as supplemented, of Bankers Trust Company	537
	8. Disclaimer of Defendant Guaranty Trust Company	540
	9. Reply to Answer of Defendant Northern Pacific Railroad Company	545
	10. Motion of Northern Pacific Railway Company to strike replies	546
	11. Notice of withdrawal of Motion to Strike replies	547
	12. Motion of Defendant Northern Pacific Railway Company, et al. to strike from Master's report	976
	13. Order denying Motion to Strike from Master's report	981
	14. Jurisdictional Statement—United States	1161
	15. Proof of service by United States, etc	1174
	16. Petition of Defendants for Appeal	1176
	17. Jurisdictional Statement—Defendants	1182
	18. Defendants' Cost Bond on Appeal	1187
	19. Statement of Points on which Northern Pacific Railway Company, et al. will rely on appeal	1190
	20. Notice served on Appellee under Supreme Court Rule 12	1194
	21. Stipulation as to contents of General Lien Mortgage of Northern Pacific Railway Company	1196
	22. The evidence, the narrative statement of evidence, except pages 407 to 439, and the original exhibits offered in evidence. (The plaintiff requests that pages 407 to 439 inclusive of the narrative statement be printed.)	
	23. Exhibit A to Answer of Bankers Trust Company	173

1733 It is believed that the points for argument can be presented without reference to the evidence, narrative statement thereof, of exhibits other than the part of the narrative statement to be printed as above requested. If it proves otherwise, the United States asks leave to refer to this unprinted matter and to have printed such, if any, portions of it as are required for the convenience of the Court and the complete and orderly presentation of the case for review.

Dated November 4, 1939.

ROBERT H. JACKSON,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
EDWARD F. MCCLANNEN,
WALTER L. POPE,
E. E. DANLY,
Special Assistants to the Attorney General.

1734 The appellees in the above-entitled cause hereby acknowledge service of the statement of points on which the United States will rely and designation of parts of the record to be printed, filed in said cause pursuant to Supreme Court Rule 13, paragraph 9. Dated November 4, 1939.

JOHN W. DAVIS,
LORENZO B. DAPONTE,
Attorneys for Northern Pacific Railway Company, Attorneys for Northern Pacific Railroad Company, and Attorneys for Northwestern Improvement Company, Appellees.

GRANDIN TRACY VAUGHT,
ALFRED N. HEUSTON,
Attorneys for Bankers Trust Company, Appellee.
JOHN B. MARSH,
Attorneys for City Bank Farmers Trust Company, Appellee.

[File endorsement omitted.]

1735 In Supreme Court of the United States

October Term, 1939

No. 476

Designation of additional portions of record for printing

Filed Nov. 8, 1939

Defendants, pursuant to Rule 13, paragraph 9, designate the following additional portions of the record for printing in addition to those portions listed in plaintiff's designation of the record served and filed herein on or about November 4, 1939, to wit:

Plaintiff's statement of the evidence beginning with page 1 and ending on page 136 down to testimony of John M. Evans, except that portion on page 76 beginning with "Northern Pacific Exhibit 72" and ending on page 76c, which may be omitted.

Dated November 6, 1939.

JOHN W. DAVIS,
L. B. DAPONTE,
TRACY G. VAUGHT,
ALFRED N. HEUSTON,
JOHN B. MARSH,
Attorneys for Northern Pacific Railway Company et al.—Case No. 476.

1736 Appellant in the above-entitled cause hereby acknowledges service of the Designation of Additional Portions of Record For Printing in No. 476, United States of America, Appellant v. Northern Pacific Railway Company et al.

NORMAN M. LITTELL,
Assistant Attorney General.
ROBERT H. JACKSON,
Solicitor General.

[File endorsement omitted.]

1737 Supreme Court of the United States

October Term, 1939

No. 477

Statement of points on which appellants Northern Pacific Railway Company et al. will rely

Filed Oct. 27, 1939

To the UNITED STATES OF AMERICA, *Appellee;* and ROBERT H. JACKSON, *Solicitor General;* NORMAN M. LITTELL, *Assistant Attorney General;* WALTER L. POPE and E. E. DANLY, *Special Assistants to the Attorney General, Attorneys for Appellee.*

The appellants Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company, Bankers Trust Company, and City Bank Farmers Trust Company, state that the only point on which they will rely on their appeal herein is that the District Court erred in adjudging by Paragraph IX of the Decree entered June 27, 1939, that the withdrawals of 218,001.66 acres (except 16,240 acres also within first indemnity limits of the grant of July 2, 1864) from second indemnity limits of the grant of May 31, 1870, in the state
1738 of Washington, described in Schedule K attached to said Decree, are valid and that said land should be retained by the United States without payment of compensation to defendants or any of them; that the District Court erred in Conclusion (b) attached to Finding III of the Findings of Fact and Conclusions of Law filed June 27, 1939, that Northern Pacific Railroad Company and Northern Pacific Railway Company were not entitled to indemnity under the grant of May 31, 1870, for the loss of 637,580.99 acres in odd-numbered sections within the place limits of the grant of July 2, 1864, and earned and received by

said Railroad Company under the Act of July 2, 1864; and that said District Court erred in said Conclusion (b) of Finding III that the grant by the Joint Resolution of May 31, 1870, in Washington was not deficient on September 22, 1882, the date of final location of the line authorized by said Joint Resolution and that second indemnity limits in Washington therefore were not authorized and that said withdrawal of 213,001.66 acres from said second indemnity limits of Washington (except 16,240 acres, also within first indemnity limits of the grant of July 2, 1864) were and are valid.

Appellants refer to their Assignment of Errors for further particulars.

JOHN W. DAVIS,
LORENZO B. DAPONTE,
Counsel for Appellants Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company.

GRANDIN TRACY VAUGHT,
ALFRED N. HEUSTON,
Counsel for Appellants Bankers Trust Company.

1739 JOHN B. MARSH,
Counsel for Appellant City Bank Farmers Trust Company.

1740 We hereby admit service of the foregoing Statement of Points on which Appellants, Northern Pacific Railway Company et al., Will Rely, pursuant to Rule 13, paragraph 9. Dated October 26th, 1939.

NORMAN L. LITTELL,
Counsel for Appellee, United States of America.
ROBERT H. JACKSON,
Solicitor General.

1741 Supreme Court of the United States

October Term, 1939

No. 477

Designation of parts of the record to be printed

Filed Oct. 27, 1939

To the CLERK:

Appellants, Northern Pacific Railway Company et al., file their designation of the parts of the record to be printed on their appeal, pursuant to Rule 13, paragraph 9, to-wit:

1. That portion of the Master's report on adjustment, filed July 26, 1937, beginning at p. 120 and ending at p. 138, being all that portion of said report under the heading, "GRANT OF MAY 31, 1870," beginning on page 120, and under the heading, "Tacoma Overlap," beginning on page 123. This matter is found in the transcript from the District Court at p. 937 to p. 955. That part of the Master's formal findings and conclusions under the heading, "Grant of May 31, 1870," beginning at the bottom of page 150 of said report, and that part under the heading, "II Tacoma Overlap," on p. 151. This matter is found at p. 967 and p. 968 in the transcript from the District Court.

1742 2. Amended order of reference, dated April 21, 1936. Transcript from District Court, p. 815.

3. Exception No. 2 of defendants, Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company. Transcript from District Court, p. 982, 983.

4. Exception No. 2 of defendants, Bankers Trust Company and City Bank Farmers Trust Company. Transcript from District Court, p. 986, 987.

5. Item No. 23 of order on exceptions to Master's report, dated March 22, 1938, together with date and judge's signature. Transcript from District Court, p. 1024.

6. Finding of fact No. III and conclusion of law under the heading, "Tacoma Overlap," beginning at p. 26 and ending at p. 33, together with date and judge's signature. Transcript from District Court, p. 1084 to p. 1091.

7. Decree, opening paragraph reading as follows:

"This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof and pursuant to Section 5 of the Act of June 25, 1929, it is ordered, adjudged, and decreed as follows, viz:"

and paragraph IX thereof, with the date and judge's signature. Transcript from District Court, p. 1129, 1138.

8. That part of stipulation, dated August 21, 1939, entitled "Stipulation Relating to Schedules Attached to Decree," reading as follows:

"For the purpose of abbreviating the record in the above-entitled cause as contemplated by Rule 75 (e) of the Federal Rules of Civil Procedure and Rule 10 (2) of the Supreme Court, all parties hereto stipulate and agree as follows:

"Certain schedules attached to the decree are entitled as follows:

* * * * *

"'Schedule K—List of 196,761.66 acres in Second Indemnity Limits of the Grant of May 31, 1870, to which the United States is entitled to have its title quieted without payment of compensation to defendant.'

* * * * *

"It is stipulated that the schedules above referred to need not be incorporated in the record on the appeals to the Supreme Court and that this stipulation shall be incorporated therein in their stead.

"Dated August 21, 1939.

"(Signatures of counsel for plaintiff and defendants.)"

Transcript from District Court, p. 1143, 1145, 1146.

1743 9. Defendants' narrative statement, plaintiff's amendments thereto, and certificate of court. This matter is found in transcript from District Court between pages 1650 and 1695.

10. Amended certificate of Special Master, dated January 14, 1935. This matter is found in transcript from the District Court at p. 779.

11. Motion of defendants Northern Pacific Railway Company et al., filed December 10, 1937, with affidavit of J. M. Hughes attached thereto. Transcript from District Court, p. 976, 980.

12. Order filed December 18, 1937, denying the foregoing motion. This matter is found at p. 987 of transcript from District Court.

13. Petition of these appellants for appeal. Transcript from District Court, p. —.

14. Order of District Court allowing appeal of these appellants. Transcript from District Court, p. —.

15. Cost bond of these appellants. Transcript from District Court, p. —.

16. Assignment of errors of these appellants. Transcript from District Court, p. —.

17. Citation served upon appellee United States of America, together with proof of service. Transcript from District Court, p. —.

18. This designation of parts of the record to be printed, with proof of service thereof.

19. Statement of points on which these appellants intend to rely, with proof of service.

JOHN W. DAVIS,
L. B. DAPONTE,
Counsel for Appellants, Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company.

GRANDIN TRACY VAUGHT,
ALFRED N. HEUSTON,
Counsel for Appellant, Bankers Trust Company.

1744 JOHN B. MAISH,
Counsel for Appellant, City Bank Farmers Trust Company.

We hereby admit service of the foregoing "Designation of the parts of the record to be printed" of appellants, Northern Pacific Railway Company et al, pursuant to Rule 13, paragraph 9.
Dated October 26, 1939.

NORMAN M. LITTELL,
ROBERT H. JACKSON,
Solicitor General (A. Q.),
Counsel for Appellee, United States of America.

[File endorsement omitted.]

1745 In Supreme Court of the United States

October Term, 1939

No. 476

No. 477

Stipulation for printing record

Filed Oct. 28, 1939

Both parties having appealed herein and desiring to shorten the record, avoid duplication and unnecessary printing, it is stipulated as follows:

I

That there shall be but one record printed and there shall be printed as part of said record all of the documents listed by the parties in their respective designations of the record served and filed in this cause pursuant to Rule 13, paragraph 9.

1746

II

It is further stipulated that each of the parties to the above entitled cause shall have the right to refer in its briefs and oral arguments to any portions of the typewritten transcript of the record and original exhibits filed in this court, which are not contained in the record printed pursuant to this stipulation, in the same manner as if such typewritten transcript had been printed in full.

III

It is further stipulated that notwithstanding anything herein contained either party may at any time not less than 40 days prior to submission of the case require the other party to print additional portions of the record as provided by Rule 13, paragraph 9, notwithstanding that the time therefor under said rule has expired.

IV

In estimating the cost of printing the record under Rule 13, paragraph 2, the clerk shall furnish each party with the estimated cost of printing the parts of the record designated for its appeal, in the same manner as if separate records had been printed.

ROBERT H. JACKSON,
(A. J.)
Solicitor General, Counsel for the United States of America.
JOHN W. DAVIS,
LORENZO B. DAPONTE,
Counsel for Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company.

1747

GRANDIN TRACY VAUGHT,
ALFRED N. HEUSTON,
Counsel for Bankers Trust Company.
JOHN B. MARSH,
Counsel for City Bank Farmers Trust Company.

[File endorsement omitted.]

[Endorsement on cover:] File No. 43883—43884. E. Washington, D. C. U. S. Term No. 476. The United States of America, Appellant, vs. Northern Pacific Railway Company. Northern Pacific Railroad Company, Northwestern Improvement Company, et al. Enter L. B. daPonte. Term No. 477. Northern Pacific Railway Company, Northern Pacific Railroad Company, et al., Appellants, vs. The United States of America. Filed October 20, 1939. Term No. 476 O. T. 1939, 477 O. T. 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939

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